Matter of Feliciano v Annucci
2015 NY Slip Op 30373(U)
February 27, 2015
Supreme Court, Franklin County
Docket Number: 2014-744
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
EMILIO FELICIANO, #07-A-3166,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2014-0404.79
INDEX # 2014-744
ORI #NY016015J

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Emilio Feliciano, verified on September 24, 2014 and filed in the Franklin County Clerk's office on September 26, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the decision of the respondent's designee affirming the June 23, 2014 recommendation of the Time Allowance Committee (TAC) at the Bare Hill Correctional Facility to withhold all of his potentially available good time. The Court issued an Order to Show Cause on October 7, 2014 and has received and reviewed respondent's Answer and Return, verified on December 12, 2014 and supported by the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated December 12, 2014. No Reply thereto has been received from petitioner.

On March 29, 2007 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to a determinate term of 11 years, with 5 years post-release

supervision, upon his conviction of the crime of Manslaughter 1[01]. After applying 1 year, 6 months and 28 days of potentially available good time, petitioner's conditional release date was initially calculated by DOCCS officials as October 20, 2014. The petitioner, however, had 24 months of good time recommended lost upon disposition upon a Tier III Superintendent's Hearing conducted at the Fishkill Correctional Facility and concluded on January 7, 2010. At that hearing, which was apparently based upon an incident that occurred at the Sing Sing Correctional Facility on November 22, 2009, petitioner was found guilty of violating inmate rules 104.11 (violent conduct), 104.13 (creating a disturbance), 100.10 (assault on inmate) and 113.10 (weapon).

On June 23, 2014 the TAC at the Bare Hill 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 the TAC recommended not to restore any of the good time recommended lost following the Tier III Superintendent's Hearing of January 7, 2010. *See* 7 NYCRR §261.3(b). The stated reasons for this recommendation were as follows: "All available good time is taken. This inmate has had several very serious Tier 3 reports and repeated in nature." The TAC recommendation was confirmed by the superintendent of the Bare Hill Correctional Facility on June 23, 2014 and affirmed by the commissioner's designee on July 4, 2014. This proceeding ensued.

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[1] The information pertaining to petitioner's conviction/sentencing is taken from an Amended Sentence and Commitment Order, dated May 21, 2007. Although the amended order, a copy of which is annexed to respondent's Answer and Return as Exhibit A, indicates the original sentencing date of March 29, 2007, the Court is unable to determine from the record before it the nature of the amendment.

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.

In this proceeding petitioner alleges, in relevant part, as follows:

> "During the course of my incarceration, I have had several misbehavior reports filed against me, in which I have pled or I have been found guilty of, in the past. But since my last ticket, I have held and maintained positive adjustments and have a list of Substantial efforts of Rehabilitation, with no recent disciplinary sanctions or inmate disciplinary reports . . . I have completed and achieved many required programs over the years and have been in several other facilities in which I have completed Vocational

> Training & Aggression Replacement Training [ART], as well . . . I take full responsibility for all of my past wrongful actions and of in which I have made several adjustments to my character and personality. Upon the completion of my last A.R.T. training course, I began to use all of the tool aspects of this particular program that made the changes that I had to make to my personality . . . Because I feel they [TAC/commissioner's designee] acted biasly towards my past disciplinary records, they have decided wrongfully, to hold me to my Maximum Release Date, without fully assessing the facts that I have made several changes and efforts at Rehabilitation."

Although the Time Allowance Committee Program Review Form, dated May 21, 2014 and presumably prepared in anticipation of the June 23, 2014 TAC meeting, documented petitioner's various rehabilitation efforts, including his completion of substance abuse counseling, aggression counseling (on March 30, 2014), vocational programing as well as his ongoing participation in educational and transitional services, the form also notes that petitioner's record includes "5 Tier III and 5 Tier II Disciplinary infractions." A review of the DOCCS Inmate Disciplinary History printout annexed to the respondent's Answer and Return as Exhibit C, moreover, shows four findings of guilt following Tier III Superintendent's Hearings and three findings of guilt following Tier II Disciplinary Hearings after the January 7, 2010 superintendent's hearing that resulted in the recommended loss of 24 months of good time. Two of the later Tier III Superintendent's Hearings (one concluded on January 16, 2012 and the other concluded on November 5, 2013) resulted in findings that petitioner violated inmate rules 104.11 (violent conduct), 104.13 (creating a disturbance) and 100.13 (fighting).

Petitioner's arguments to the contrary notwithstanding, given his disturbing disciplinary record, as outlined in the preceding paragraph, the Court finds nothing irrational in the determination to withhold all of petitioner's potentially available good

time. *See Worthy v. Selsky*, 6 AD3d 840 and *Rivera v. Goord*, 297 AD2d 844, *lv denied* 99 NY2d 503.

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

ADJUDGED, that the petition is dismissed.

Dated: February 27, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice