Matter of Alsaifullah v Annucci
2015 NY Slip Op 31286(U)
June 17, 2015
Supreme Court, Franklin County
Docket Number: 2015-53
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
TALIB ALSAIFULLAH, #11-A-1323,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0022.09
INDEX # 2015-53
ORI #NY016015J

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

_____X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Talib Alsaifullah, verified on January 12, 2015 and filed in the Franklin County Clerk's office on January 16, 2015. Petitioner, who is an inmate at the Franklin Correctional Facility, purported to challenged his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. In addition, petitioner challenged the December 17, 2014 decision of the respondent's designee affirming the December 17, 2014 recommendation of the Time Allowance Committee (TAC) at the Franklin Correctional Facility to withhold nine months of potentially available good time.

The Court issued an Order to Show Cause on January 29, 2015 and as a part thereof this proceeding was converted into a CPLR Article 78 proceeding with respect to the petitioner's challenge to the withholding of good time. An Amended Order to Show Cause was issued on February 18, 2015. The Court has since received and reviewed respondent's Answer and Return, including *in camera* materials, verified on April 6, 2015

and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 6, 2015. The Court has also received and reviewed petitioner's undated Reply thereto (denominated Answer), filed in the Franklin County Clerk's office on April 15, 2015, as well as his undated Amended Answer, filed in the Franklin County Clerk's office on April 27, 2015.

On March 17, 2011 petitioner was sentenced in Albany County Court, as a second felony offender, to a controlling indeterminate sentence of 1½ to 7 years upon his convictions of the crimes of Burglary 3° and Petit Larceny. He was received into DOCCS custody on March 25, 2015 certified as entitled to 328 days of jail time credit. After applying 2 years and 4 months of potentially available good time, petitioner's conditional release date was initially calculated as December 26, 2014. Upon disposition of a Tier III Superintendent's Hearing held at the Auburn Correctional Facility and concluded on February 19, 2013, however, it was recommended that petitioner lose 9 months of good time[1].

"For inmates entitled to be considered for good behavior allowances, the file of each such inmate shall be considered in the fourth month preceding the month of the earliest possible date he or she would be entitled to consideration for [conditional] release . . ." 7 NYCRR §261.3(a). That regulatory provision notwithstanding, petitioner's file was first considered by the TAC at the Franklin Correctional Facility on December 17, 2014, less than 10 days before his December 26, 2014 conditional release date[2]. On

[1] Petitioner was found guilty of violating inmate rules 104.11 (violent conduct), 100.11 (assault on staff), 113.10 (weapon) and 107.10 (interference with employee). The results and disposition of the superintendent's hearing were affirmed on administrative appeal.

[2] For what it is worth, the record reflects that petitioner did not arrive at the Franklin Correctional Facility until October 7, 2014 and that he was absent from Franklin between October 23, 2014 and December 17, 2014 (temporary placement at the Five Points Correctional Facility) in conjunction with

December 17, 2014 the committee recommended not to restore any of the good time recommended lost upon disposition of the February 2013 superintendent's hearing. The stated reason for the recommendation was the "severity" of the charges giving rise to the superintendent's hearing (assault on staff). Although the relevant provisions of 7 NYCRR §261.3(b) provide that " . . . any inmate who has had a recommended loss of good behavior allowance from the superintendent's hearing shall appear before the committee," the Court finds nothing in the record to suggest that petitioner appeared before the TAC on December 17, 2014. In any event, the TAC recommendation was confirmed by the Superintendent of the Franklin Correctional Facility on December 17, 2014 and was affirmed by the DOCCS Commissioner (or designee) on that same date.

On or about December 27, 2014 petitioner filed an inmate grievance complaint (FKN:11368-14) wherein he challenged the failure of DOCCS officials to grant him a hearing prior to the "taking" of his good time. Petitioner also challenged the fact that the TAC recommendation, superintendent's confirmation and commissioner's affirmation all occurred on the same day. In his grievance complaint petitioner specifically requested that the December 17, 2014 determination be rescinded and that he be granted a prompt hearing pursuant to 7 NYCRR §261.4.

Apparently in response to an inquiry by the Inmate Grievance Program Supervisor, the TAC at the Franklin Correctional Facility withdrew its December 17, 2014 recommendation and met again on December 30, 2014 to consider petitioner's file and decide upon a recommendation as to the amount of good behavior allowance to be

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unrelated court proceedings. Although the record herein sheds no light on a reason(s) underlying the failure of the TAC at petitioner's previous facility/facilities to meet and consider his case prior to October 7, 2014, the record does indicate that petitioner was absent from Franklin at the time of that facility's regularly-scheduled October and November 2014 TAC meetings.

granted. Although petitioner initially attended the December 30, 2014 TAC meeting, he was allegedly " . . . belligerent and basically stormed out of the TAC." On December 30, 2014 the TAC again recommended withholding all of the good time recommended lost upon disposition of the February 2013 Tier III Superintendent's Hearing. The committee again cited the "severity" of the conduct underlying the superintendent's hearing (assault of staff) as the reason for its recommendation. The recommendation was affirmed by the facility superintendent on January 6, 2015 and affirmed by the DOCCS Commissioner (or designee) on that same date.

By decision dated January 12, 2015 the Superintendent of the Franklin Correctional Facility found petitioner's grievance (FKN:11368-14) to be without merit. In his decision the superintendent noted that "[t]he TAC has withdrawn the December 17, 2014 TAC decision. A TAC meeting was held with the grievant and a new TAC decision was rendered on December 30, 2014." Although it does not appear that petitioner took an administrative appeal from the superintendent's January 12, 2015 decision to the Inmate Grievance Program Central Office Review Committee (CORC), by correspondence labeled "Grievance," dated February 3, 2015, petitioner purported to grieve " . . . the TAC and Superintendent for failing to abide by [DOCCS] Directive 4932 in regards grievance #FKN 11368-14." The record herein is unclear with respect to the ultimate disposition of petitioner's February 3, 2015 "grievance."

As a threshold matter the Court is not persuaded by respondent's argument that this proceeding should be dismissed for failure to exhaust administrative remedies. In this regard it is noted that DOCCS regulations do not include a direct administrative appeal mechanism with respect to the final order of the DOCCS Commissioner (or designee) establishing the good behavior allowance to be granted to a particular inmate.

See 7 NYCRR §262.1. As far as the Inmate Grievance Program is concerned, the Court notes that a decision/disposition of a TAC is not grievable. *See* 7 NYCRR §701.3(e)(2). Although the language of 7 NYCRR §701.3(e)(2) is curious in that a TAC is only authorized by regulation to make recommendations as to the amount of good behavior allowance to be accorded to a particular inmate (*see* 7 NYCRR §262.1(a)), the Court ultimately finds that the import of 7 NYCRR §701.3(e)(2) is to render final determinations establishing the good time allowance accorded to a particular inmate (issued in response to a TAC recommendation) non-grievable. Therefore, petitioner's apparent failure to pursue his grievance (FKN: #11368-14) all the way through to a final CORC determination does not necessitate the dismissal of this proceeding on exhaustion grounds.

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.

While the apparent failure of any facility TAC to meet and consider petitioner's file in the fourth month proceeding his original December 26, 2014 conditional release date would constitute a procedural violation under the provisions of 7 NYCRR §261.3(a), such a violation does not give rise to an entitlement to immediate release from DOCCS custody. *See Rodriguez v. Selsky*, 100 AD3d 1164 and *People ex rel Richardson v. West*, 24 AD3d 996. Inasmuch as the TAC at the Franklin Correctional Facility ultimately met to consider petitioner's file on December 17, 2014/December 30, 2014, his timeliness argument has been rendered moot.

Since the good time at issue in the case at bar was recommended lost upon disposition of a prior Tier III Superintendent's Hearing, the petitioner was not entitled to a formal TAC hearing pursuant to 7 NYCRR §261.4(a). Petitioner's assertions notwithstanding, the procedural requirements associated with formal TAC hearings, as set forth in 7 NYCRR §261.4, are simply not applicable to the TAC's consideration of his case. In this regard a distinction must be drawn between a TAC meeting conducted pursuant to 7 NYCRR §261.3 and a formal TAC hearing conducted pursuant to 7 NYCRR §261.4. At a TAC meeting the committee must consider an inmate's entire file and come to a decision with respect to the recommended amount of good behavior allowance to be granted to such inmate. At a TAC meeting ". . . any inmate who has had a recommended loss of good behavior allowance from a superintendent's hearing shall appear before the committee. The committee shall consider whether, and set forth its recommendation as

to whether, the inmate's subsequent behavior merits restoration of all or part of the lost allowance and its reasons therefor." 7 NYCRR §261.3(b). There is no regulatory provision mandating that the inmate be provided any advance notice of the meeting. Following the TAC meeting an inmate is entitled to a formal TAC hearing only "[w]here the committee has determined that there may be sufficient reason present after a review of the file not to recommend the granting of the total [good time] allowance authorized, other than time lost as the result of a superintendent's hearing . . ." 7 NYCRR §261.4(a) (emphasis added). Although the procedural mandates set forth in 7 NYCRR §261.4 must be followed at a formal TAC hearing, no formal TAC hearing was conducted in the case at bar, nor was one mandated, since the petitioner's potential loss of good time only involved good time that had been recommended lost as the result of prior superintendent's hearings. *See Worthy v. Selsky*, 6 AD3d 840, *Godwin v. Goord,* 282 AD2d 850, and *People ex rel Hawkins v. Scully*, 151 AD2d 527.

Petitioner also argues that if the TAC had assessed his file "impartially and in accordance with the precedents of [7 NYCRR §261.4] it should have and could have been adduced that . . . [petitioner] at the behest/recommendation of the NYSDOCCS, participated and completed the Aggressive [Aggression?] Replacement Training therapeutic program for 10 weeks as required by NYSDOCCS for inmates who have misbehavior reports exhibiting any violent conduct while incarcerated . . . [and] [t]hat [petitioner] exhibited positive institutional adjustment from 2/7/13 [the date of the incident giving rise to the Tier III Superintendent's Hearing concluded on February 19, 2013], without receiving any misbehavior infractions or sanctions to presently; participated in and completed the required vocational, work and therapeutic programs and was reclassified from maximum security to medium security prior to the 12/17/14

[TAC] decision. All of which demonstrated positive institutional adjustment since 2/7/13."

Although petitioner's reference to 7 NYCRR §261.4 in the preceding paragraph is misplaced since, as determined previously, he was not entitled to a formal TAC hearing, his arguments with respect to the TAC's failure to consider his post-superintendent's hearing conduct is germane with respect to the TAC meetings conducted pursuant to 7 NYCRR §261.3 on December 17, 2014/December 30, 2014. At those meetings the TAC's limited function was to ". . . consider whether, and set forth its recommendation as to whether, the inmate's subsequent [post-superintendent's hearing] behavior merits restoration of all or part of the lost allowance and its reasons therefor." 7 NYCRR §261.3(b). *See Pfeifer v. Goord*, 272 AD2d 886. In the case at bar, however, the TAC merely predicated its recommendation not to restore any of petitioner's recommended lost good time on the severity of the incident giving rise to the February 2013 superintendent's hearing. The Court concludes that the TAC recommendation constituted the withholding of petitioner's good time based not upon his entire institutional experience but, rather, in accordance with an automatic rule, in violation of the provisions of 7 NYCRR §261.3(c). In reaching this conclusion the Court notes that Tier III classifications of inmate disciplinary infractions are, by definition, reserved for the more serious infractions, inasmuch as lesser offenses are classified Tier I or Tier II. *See* 7 NYCRR §251-2.2(b). Moreover, a review of the dispositional alternatives available after a finding of guilt at a superintendent's hearing, as set forth in 7 NYCRR §254.7, reveals that the recommended loss of good time represents a comparatively severe dispositional penalty that is presumably reserved for more egregious tier III infractions. Since any Tier III infraction resulting in a disposition recommending the loss good time might,

therefore, properly be deemed to be a serious infraction, it is apparent that the seriousness of the infraction, in and of itself, cannot stand as the sole basis for a TAC recommendation not to restore petitioner's tentatively lost good time. This is not to suggest that the nature of the underlying infraction is irrelevant. Rather, the seriousness/severity of the infraction must be considered by the TAC in conjunction with its analysis of the inmate's conduct after the Tier III disposition.

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 decision of the respondent's designee affirming the December 30, 2014 recommendation of the TAC at the Franklin Correctional Facility to withhold nine months of potentially available good time is vacated and the matter is remanded to the TAC with the direction that it forthwith reconsider petitioner's file and make a new recommendation, in accordance with the provisions of this Decision and Judgment, as to whether or not petitioner's behavior subsequent to the Tier III Superintendent's Hearing concluded on February 19, 2013 merits restoration of all or part of the good time recommended lost upon disposition of that superintendent's hearing.

Dated: June 17, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice