

Matter of Anderson v Inmate Records Clerk, CCF
2018 NY Slip Op 33275(U)
December 18, 2018
Supreme Court, Clinton County
Docket Number: 2018-672
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT****COUNTY OF CLINTON**

In the Matter of the Application of
TREVOR ANDERSON, #12-B-3483,
Petitioner,

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

DECISION, ORDER & JUDGMENT
RJI #09-1-2018-0234.15
INDEX #2018-672

-against-

INMATE RECORDS CLERK, CCF,
Respondent.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Trevor Anderson, supported by the Petitioner's Affidavit in Support of Order to Show Cause, dated on May 4, 2018 and were filed in the Clinton County Clerk's Office on May 9, 2018. Petitioner, who is an inmate at the Clinton Correctional Facility, challenges the calculation of his good time credit.

The Court issued an Order to Show Cause on May 15, 2018. In response thereto, the Court has received the Answer and Return, together with a Letter-Memorandum from Christopher J. Fleury, Esq., Assistant Attorney General, dated August 15, 2018. Thereafter, on September 4, 2018, the Court has received and considered the Petitioner's Reply as well as a "notice of Motion in Support of Petitioner's Reply to the Attorney General's Answer and Return, and Demand for Incidental Damages Pursuant to CPLR §7806." By letter-order dated September 7, 2018, the Court granted leave to the Attorney General's Office to submit a sur-reply. The Court received the Respondent's sur-reply on September 19, 2018.

On November 7, 2012, the Petitioner was sentenced by the Onondaga County Court to a five (5) year determinate term of incarceration with five (5) years of post-release supervision upon the conviction of the crime of Attempted Assault in the First Degree. The

Petitioner was received into the custody of the New York State Department of Corrections and Community Supervision (hereinafter referred to as “DOCCS”) on November 19, 2012 with 233 days of jail time credit for the period of March 31, 2012 until November 18, 2012. At that time, the Petitioner’s maximum expiration date was calculated to be March 25, 2017 and the possible good time allowance was calculated to be 8 months and 20 days, or the equivalent of 1/7 of the 5 year determinate term pursuant to Correction Law §803(1)(c). Thereafter, on December 18, 2014, the Cayuga County Court sentenced the Petitioner to an indeterminate term of incarceration for a period of two (2) to four (4) years to be served consecutively to his previous sentence upon the conviction of the crime of Promoting Prison Contraband in the First Degree. Upon the 2014 sentence, the Petitioner’s maximum expiration date was re-calculated to be March 25, 2019 as the two (2) year minimum consecutive indeterminate term was added to the five (5) year determinate sentence.

Petitioner argues that the Respondent has erroneously calculated the possible good time that should be afforded to the Petitioner. Petitioner cites Penal Law (hereinafter referred to as “PL”) §70.30(1)(d) to require that the 1/7 good time credit be assessed as against the aggregate maximum sentence of 7 years as opposed to the 1/7 as against the 5 year determinate term. Petitioner further argues that upon the proper calculation, his conditional release date would have been March 19, 2018 which has long since passed. Petitioner also seeks to be compensated for what he denominates as “incidental damages” in the amount of \$150.00 per day.

Respondent puts forth the Affirmation of Jarrod Sanford, Assistant Counsel, Office of Sentencing Review (Resp. Ex. A) to clarify the time calculation. Attorney Sanford argues that the Petitioner is misinterpreting the application of PL §70.30(1)(d) insofar as he fails

to also apply PL §70.40(1)(b)(ii). As such, the Petitioner cannot be conditionally released at a date prior to his parole eligibility date pursuant to PL §70.40(1)(b)(ii), which applying all of the good time the Petitioner is eligible for under PL §70.30(1)(d) would otherwise allow. In addition, the Petitioner's statutory good time of 8 months and 20 days was revoked on April 12, 2018 and the Petitioner is not eligible for release on the conditional release date. Respondent asserts that the petition fails to request incidental damages and same cannot be requested in the first instance in the reply; notwithstanding the procedural irregularity, the Petitioner seeks to penalize the Respondent in the amount of \$150.00 per day, which is not allowed pursuant to CPLR §3011.

Insofar as the Petitioner was sentenced to a determinate sentence of 5 years plus an additional indeterminate term of 2 to 4 years to be served consecutively, PL §70.30(1)(d) is instructive as to the length of the sentence:

“If the defendant is serving one or more indeterminate sentences of imprisonment and one or more determinate sentence of imprisonment which run consecutively, the minimum term or terms of the indeterminate sentence or sentences and the term or terms of the determinate sentence or sentences are added to arrive at an aggregate maximum term of imprisonment, provided, however, (i) that in no event shall the aggregate maximum so calculated be less than the term or maximum term of imprisonment of the sentence which has the longest unexpired time to run; and (ii) that the aggregate maximum term of imprisonment shall be subject to the limitations set forth in paragraphs (e) and (f) of this subdivision, where applicable.”

As to the determination of good time allowance, Correction Law §803(2)(f) specifies how to calculate good time when a person is serving a determinate and an indeterminate sentences consecutively:

“2. If a person is serving more than one sentence, the authorized allowances may be granted separately against the term or maximum term of each sentence or, where consecutive sentences are involved, against the aggregate maximum term. Such allowances shall be calculated as follows:

(f) A person serving one or more indeterminate sentence and one or more determinate sentence which run consecutively may receive time allowance not to exceed the sum of one-third of the maximum or aggregate maximum of the indeterminate sentence or sentences and one-seventh of the term or aggregate maximum of the determinate sentence or sentences.”

Based upon Correction Law §803(2)(f), the Petitioner’s argument that the good time allowance should have been calculated against the aggregate maximum sentence of 7 years is incorrect. Indeed, as indicated by the Affirmation of Attorney Sanford, the good time allowance against the determinate term was calculated to be 8 months and 20 days, while the good time allowance against the indeterminate term was calculated to be 1 year 4 months. However, as Attorney Sanford asserts, the Petitioner cannot be released on a conditional release date prior to parole eligibility date pursuant to PL §70.40(2)(f).

PL §70.40(2)(f) provides:

“A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term; provided, however, that (i) **in no event shall a person serving one or more indeterminate sentence of imprisonment and one or more determinate sentence of imprisonment which run concurrently be conditionally released until serving at least six-sevenths of the determinate term of imprisonment which has the longest unexpired time to run** and (ii)

in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law (emphasis added).”

While Petitioner would be presumably eligible for an additional 1 year and 4 months of good time allowance related to the indeterminate term, same has been obviated by the requirement to serve 6/7 of the determinate term. Notwithstanding the foregoing, insofar as the good time allowance provided to the Petitioner relative to his determinate term was revoked on April 12, 2018 (which is not at issue in this proceeding), the Petitioner is not eligible for immediate release nor a recalculation of his conditional release date. The Respondent’s application of the law to the Petitioner’s sentences is correct.

Petitioner is likewise not entitled to “incidental damages” for the calculation of his conditional release date or his parole eligibility date. As such, Petitioner’s request for same is denied.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ORDERED**, that the Petitioner’s motion for incidental damages is denied; and it is further

ADJUDGED, that the petition is dismissed.

Dated: December 18, 2018 at
Lake Pleasant, New York.

S. Peter Feldstein
Acting Supreme Court Justice