

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

STATE OF WEST VIRGINIA ex rel.
ARON FREELAND,

Petitioner,

v.

Civil Action No. 20-P-285
Judge Kenneth D. Ballard

2022 JAN 13 PM 1:12
GATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

BETSY JIVIDEN, Commissioner,
West Virginia Division of Corrections and
Rehabilitation,

Respondent.

ORDER DENYING WRIT OF MANDAMUS/PROHIBITION

ON AN EARLIER DAY, the Court held a hearing on the Petition for Writ of Mandamus/Prohibition filed by Petitioner, Aron Freeland and the Response to the Petition for Writ of Mandamus/Prohibition filed by the Respondent, Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation. Petitioner seeks to compel the Respondent to develop a policy directive and/or operational procedure to comply with an alleged nondiscretionary duty imposed by West Virginia Code Section 15A-4-17(i). Having carefully considered the parties' filings to date, and upon the facts and matters submitted herein, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. Petitioner filed his "Petition for Writ of Mandamus/Prohibition" on October 7, 2020.
2. The Petition was referred to the West Virginia Attorney General's Office who filed a response to the Petition on March 24, 2021.
3. Petitioner brings his Petition for relief pursuant to W. Va. Code § 53-2-1 and Article VIII § 6 of the West Virginia Constitution.

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4. Petitioner is an inmate in the custody of the West Virginia Division of Corrections and Rehabilitation, and is currently housed at Huttonsville Correctional Complex.¹

5. Petitioner is serving a term of imprisonment for felony offenses arising out of Circuit Court of Monongalia County, West Virginia.²

6. Petitioner does not attack his sentence, nor does he challenge any condition of confinement. Rather, Petitioner alleges that he is being denied his "statutory and constitutional right...to apply for extra good time for exceptional work" performed while in the WVDCR's custody. (Pet. at 3.)

7. Petitioner presents three questions to the Court as follows:

- a. As an appointed state official, does the Commissioner of West Virginia Division of Corrections have a legal nondiscretionary duty to develop a policy directive and/or operational procedure that is in compliance with W. Va. Code § 15A-4-17(i) that was passed in HB 4338 during the 2018 legislative session?
- b. Has the Commissioner of West Virginia Division of Corrections exceeded her lawful authority by failing to implement a policy directive and/or operational procedure to permit inmates who are in her custody the opportunity to apply for "extra good time for exceptional work or services performed?"
- c. Is it a violation of a petitioner's fundamental constitutional rights secured under Art. III § 10 of W. Va. Constitution and the 14th Amendment of the U.S. Constitution by not developing a policy directive and/or operational procedure so inmates can apply to earn "extra good" time for exceptional work or services performed?

8. Petitioner argues as follows:

"[i]n July 2018, the West Virginia Legislature repealed chapter twenty-five of W. Va. Code. That revision of chapter twenty-five is now W. Va. Code §15A-4-1 et seq. The revision went into effect July 1, 2018. The legislature added section (i) to W. Va. Code § 15A-4-17 which permits inmates the opportunity to apply to the superintendent for extra good time for exceptional work or services performed. However, the West Virginia Division of Corrections has failed to develop a policy

¹ See, WVDCR Offender Search at--

<https://apps.wv.gov/OIS/OffenderSearch/DOC/Offender/Details?id=PmtYS3r8kLYbq74imG1zDOGc%2FjpaCmR1JsVy5OD%2FhOhLlJDF5%2FEIMC3gRtiZIt6rN2GcG1sSYM5s2VZlj61YJg9I9mFwFsAEsQYd2Hc5z5FmqtqRyLNNOj3GLjd dwWKwT5dHjIUJYd1QJamvI6nAgtGYmg4BHUczLvOYOifkl3M%3D>

² *Freeland v. Ballard*, No. 11-0126, 2013 WL 1395890, at *1 (W. Va. Apr. 5, 2013)

directive and/or operational procedure so inmates can apply ear, [sic] extra good time.”

9. Respondent argues that a Writ of Mandamus is not an available remedy given Petitioner's allegations because there is no clearly established right to the relief sought in the Petition, and that Petitioner has not otherwise set forth adequate grounds for relief. (*See Generally* Response).

CONCLUSIONS OF LAW

1. As an extraordinary remedy, a writ of mandamus will not issue unless a party can demonstrate (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). “Mandamus lies to require the discharge by a public officer of a nondiscretionary duty. *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va. 479 [153 S.E.2d 284 (1967)].” Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.B.2d 545 (1969).” *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009). “[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief[.]” *52 Am. Jur. 2d Mandamus* § 3 at 271 (2000) (footnote omitted), a failure to meet any one of them is fatal.” *Id.* Where a petitioner fails to show a clear right to the remedy sought mandamus relief is not warranted or appropriate.

2. Petitioner filed this action as a writ of mandamus. While the Petition is styled “Petition for Mandamus/Prohibition” Petitioner only addresses case law relating to a Writ of Mandamus and the relief sought is consistent with a Writ of Mandamus. The Petition does not cite any case law relating to the issuance of a Writ of Prohibition. Further, a Writ of Prohibition is not appropriate for the relief sought in the Petition. Accordingly, the Court construes the Petition as one seeking the issuance of a Writ of Mandamus.

3. "A writ of mandamus will not issue unless three elements coexist—(1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Petitioner fails on each element.

4. "The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute." Syl. Pt. 2, *Hickman v. Epstein*, 192 W. Va. 42, 450 S.E.2d 406 (1994). The West Virginia Supreme Court has stated that "[a] writ of mandamus will not be issued in any case when it is unnecessary or when, if used, it would prove unavailing, fruitless or nugatory." Syl. Pt. 2, *State ex rel. Capitol Bus. Equip., Inc. v. Gates*, 155 W. Va. 64, 180 S.E.2d 865 (1971) (citing Syl. Pt. 6, *Delardas v. Morgantown Water Comm.*, 148 W. Va. 776, 137 S.E.2d 426 (1964)). Furthermore, "[t]he writ of mandamus will not issue to compel the performance of a duty already discharged." Syl. Pt. 1, *Gates*, 155 W. Va. 64, 180 S.E.2d 865 (citing Syl. Pt. 1, *Monongalia Improvement Company et al. v. Morris, Judge, etc.*, 106 W. Va. 243, 145 S.E. 387 (1928)).

5. The Petitioner's Petition is based on his interpretation of W.Va. Code §15A-4-17 (2018). However, since the original filing of his Petition, this code section has been amended and replaced. On March 25, 2021, Senate Bill 713³ was introduced by a bipartisan group of thirteen Senators. The introduction noted the purpose of the Act:

AN ACT to amend and reenact §15A-4-17 of the Code of West Virginia, 1931, as amended, relating generally to inmate good time; updating references to personnel; clarifying that inmates in the custody of the Commissioner of the Division of Corrections and Rehabilitation receive basic good time unless expressly excluded; creating certain exclusions; clarifying that inmates who received good time on or before October 21, 2020, are entitled to the good time, unless it is lost due to a

³ http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=713&year=2021&sessiontype=RS (accessed April 28, 2021).

disciplinary violation; establishing basis for earning extra good time *in the discretion of the commissioner*; and granting civil immunity to the Division of Corrections and Rehabilitation, its commissioner, employees, agents, and assigns for any and all claims relating to calculation of good time for certain offenders occurring before October 21, 2020.

(emphasis added)

6. After the requisite readings, Senate Bill 713 passed the West Virginia Senate on March 29, 2021, with a vote of 33-0 with one absent. The bill then passed on to the West Virginia House of Delegates where, on April 6, 2021, it passed with a vote of 94-5 with one absent. On April 7, 2021, the bill returned to the Senate, as the House had added an effective date of April 30, 2021, to the bill. Senate Bill 713 passed the Senate with this single amendment on April 7, 2021, with a vote of 34-0. The completed legislation was passed to Governor Jim Justice on April 13, 2021, then approved and signed by the Governor on April 19, 2021.

7. W.Va. Code § 15-A-17(i)(2018) states:

(i) The superintendent may, with the approval of the commissioner, allow extra good time for inmates who perform exceptional work or service.

Senate Bill 713 changed this section to state:

(i)(1) An eligible inmate may receive extra good time in the sole discretion of the commissioner for meritorious service or performing extra assigned duties during emergencies; and (2) In addition to the good time granted under subsection (c) of this section and that authorized by subdivision (1) of this subsection, an eligible inmate serving a felony sentence may receive up to 90 days good time per program for successfully completing an approved, but not required, academic or vocational program, which is not part of the inmate's required individualized reentry programming plan. The commissioner shall adopt a written policy to effectuate the purposes of this subsection.

8. In both the 2018 version and the new amendments, extra good time is discretionary. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165

S.E.2d 108 (1968). As this Court restated in *State ex rel. Bailey v. State Div. of Corrs.*, 213 W. Va. 563, 568, 584 S.E.2d 197, 202 (2003), “[i]n any search for the meaning or proper applications of a statute, we first resort to the language itself. *Maikotter v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ.*, 206 W. Va. 691, 696, 527 S.E.2d 802, 807 (1999).”

9. In 2018, the discretion was with the superintendent to recommend extra good time, with the approval of the commissioner, for exceptional work or service. The amendments in SB 713 clearly state that the discretion rests solely with the commissioner. It limits extra good time credit to meritorious service during emergencies. Nothing in either W.Va. Code § 15-A-17(i)(2018) or SB 713 authorizes or requires the creation of policies to determine extra good time credit.

10. The Petitioner’s first question presented as follows:

As an appointed state official, does the Commissioner of West Virginia Division of Corrections have a legal nondiscretionary duty to develop a policy directive and/or operational procedure that is in compliance with W.Va. Code § 15A-4-17(i) that was passed in HB 4338 during the 2018 legislative session?

11. Petitioner’s first question must be answered in the negative. The clear language of both W.Va. Code § 15A-4-17(i) (2018) and also the amendments in SB 713 place the authority in the sole discretion of the commissioner with approval from the superintendents. Nothing in this section requires or contemplates a policy directive and/or operational procedure relating to extra good time. Therefore, the Petitioner fails to demonstrate “the existence of a clear right in the petition to the relief sought.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Further, the Petitioner has failed to establish “the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel.” *Id.*

12. The Petitioner’s second question presented:

Has the Commissioner of West Virginia Division of Corrections exceeded her lawful authority by failing to implement a policy directive and/or operational procedure to permit inmates who are in her custody the opportunity to apply for “extra good time for exceptional work or services performed?”

13. Petitioner's second question must also be answered in the negative. The clear language of both W.Va. Code § 15A-4-17(i) (2018) and also the amendments in SB 713 place the authority in the sole discretion of the commissioner with approval from the superintendents. Nothing in this section requires or contemplates a policy directive and/or operational procedure to allow inmates to apply for extra good time credit. The legislature chose not to include a requirement to allow inmates to apply for extra good time credit. See *Phillips v. Drive-In Pharmacy, Inc.* 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007) ("The expression *unius maxim* is premised upon an assumption that certain omissions from a statute by the Legislature are intentional."). Therefore, the Petitioner fails to demonstrate "the existence of a clear right in the petition to the relief sought." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Further, the Petitioner has failed to establish "the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel." *Id.*

14. The Petitioner's third question presented:

Is it a violation of a petitioner's fundamental constitutional rights secured under art. III § 10 of W.Va. Constitution and the 14th Amendment of the U.S. Constitution by not developing a policy directive and/or operational procedure so inmates can apply to earn "extra good" time for exceptional work or services performed?

15. The West Virginia Supreme Court of Appeals noted in Syl. Pts. 4, 5, 6, *State ex rel. Anstey v. Davis*, 203 W.Va. 538509 S.E.2d 579 (1998):

4. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

5. "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or

understandings." Syllabus Point 3, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

6. To have a property interest, an individual must demonstrate more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it under state or federal law. Additionally, the protected property interest is present only when the individual has a reasonable expectation of entitlement deriving from the independent source.

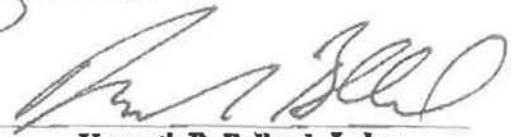
16. The Petitioner has failed to demonstrate that he has a property interest in receiving extra good time credits. Petitioner has not demonstrated that he is entitled to any "good time" award or that any such award of time has been wrongfully deprived or taken away. Both W.Va. Code § 15A-4-17(i) (2018) and the amendments in SB 713 place the authority to award extra good time credit in the sole discretion of the commissioner with approval from the superintendents. Petitioner has failed to demonstrate a legitimate claim of entitlement to it under federal or state law. Therefore, the Petitioner fails to demonstrate "the existence of a clear right in the petition to the relief sought." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Further, the Petitioner has failed to establish "the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel." *Id.* Thus, the Petitioner's Petition fails to demonstrate an entitlement to the requested writ.

THEREFORE, having carefully reviewed and considered the parties' filings and the facts and matters submitted therein, the Court hereby **FINDS** that Petitioner has failed to set forth sufficient grounds for a Writ of Mandamus to issue pursuant to W. Va. Code § 53-1-2 and Article VIII § 6 of the West Virginia Constitution. Accordingly, it is hereby **ORDERED** that the Petition for Writ of Mandamus filed by the Petitioner, Aron Freeland, is **DISMISSED** and that this matter be **STRICKEN** from the docket of this Court.

The objections of the Petitioner are noted and preserved.

The Clerk is **DIRECTED** to transmit an attested copy of this *Order* to all counsel of record and any unrepresented parties.

ENTERED the 13th day of January, 2023.


Kenneth D. Ballard, Judge

1-13-23
P. Sward
A. Freeland

Date
 Certified copies sent to
counsel of record
 parties
 other
 Question answered
By: Original of case sent
 to
 Name
 Other directed
Deputy Circuit Clerk