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SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 22-0109

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**STATE EX REL ARON FREELAND,
PETITIONER,**

V.

**BETSY C. JIVIDEN, COMMISSIONER FOR WEST VIRGINIA DEPARTMENT OF
CORRECTIONS, RESPONDENT**

Appeal from a final order of the Circuit
Court of Kanawha (20-P-285)

PETITIONER'S BRIEF

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WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A WRIT OF
MANDAMUS REQUIRING THE RESPONDENT COMMISSIONER OF THE
WEST VIRGINIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION TO DEVELOP A WRITTEN POLICY IN COMPLIANCE
WITH W. VA. CODE § 15A-4-17(i)(2) TO EFFECTUATE THE PURPOSE OF
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I. ASSIGNMENTS OF ERROR

THE TRIAL COURT ERRED BY NOT GRANTING A WRIT OF MANDAMUS REQUIRING THE RESPONDENT COMMISSIONER OF THE WEST VIRGINIA DEPARTMENT OF CORRECTIONS AND REHABILITATION TO DEVELOP A WRITTEN POLICY IN COMPLIANCE WITH W. VA. CODE § 15A-4-17(i)(2) TO EFFECTUATE THE PURPOSES OF W. VA. CODE § 15A-4-17(i).

II. STATEMENT OF THE CASE

The Petitioner appeals the decision of the Honorable Kenneth Ballard, Circuit Court Judge, Kanawha County dated 1/13/22, denying the Petitioner's petition for a rule to show cause to issue against the Respondent Commissioner of Corrections to develop a written policy directive and operational procedure in compliance with W.Va. Code § 15A-4-17(i)(2). (p. 134)

The Petitioner is an inmate currently serving his sentence from Monongalia County at the Huttonsville Correctional Center. Respondent is the Commissioner of the West Virginia Division of Corrections and Rehabilitation. In July 2018, the West Virginia Legislature repealed Chapter 25 of the West Virginia Code including provisions addressing good time for inmates and passed new legislation addressing the subject matter of good time. The provision of the new legislation relevant to these proceedings is W.Va. Code §15A-4-17(i). The language of the 2018 statute provides that, "The superintendent may, with the approval of the commissioner, allow extra good time for inmates who perform exceptional work or service".

Petitioner began in January 2019 to request information from the Office of the

Commissioner/Respondent about applying for the extra good time referred to in the new W. Va. Cod § 15A-4-17(i). (p. 42) Petitioner continued to inquire about applying for extra good time and to determine when or if any policy directive had been promulgated to guide inmates eligible for good time and extra good time to apply by writing letters to the Office of the Commissioner and filing grievances at Huttonsville Correctional Center. (pp. 44-62) Petitioner was only provided policy directives promulgated prior to the amendments to the statute in 2018. (p. 53)

After attempting to obtain relief through the administrative process, Petitioner gave notice pursuant to W. Va. Code § 55-17-3(a)(1) of his intention to bring this action. Petitioner specifically mentioned the basis of his claim referring to W. Va. Code § 15A-4-17(i) and his exhaustion of administrative remedies. (p. 22) Petitioner filed the instant civil action on 10/7/20 with attached exhibits in support. (pp. 22, 39, 41, 43, 46, 48, 51, 54, 56, 58, 63, 66, 71, 79).

On March 29, 2021, Senate Bill 713 passed amending W. Va. Code § 15A-4-17. As relevant to these proceedings, the statute was amended to read:

“ (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.” (Emphasis added.) On July 21, 2021, Petitioner had filed a proposed order citing the language added regarding the development of a written policy and that such a policy be submitted within 45 days. (pp 87, 88) In subsequent pro se filings, the Petitioner made clear the purpose of the writ was to require the Respondent to comply with the statute and develop a written policy in compliance with the 2021 amendments to the statute. (pp. 90, 91, 99, 104, 106, 113)

On December 15, 2021, the Court held a hearing on Petitioner’s Writ of Mandamus/Prohibition, asking the court to issue an order to the Respondent to show cause why she has failed to develop a written policy in compliance with W. Va. Code § 15A-4-17(i). The Petitioner, Aron Freeland appeared in person and by counsel. The Respondent, Betsey Jividen appeared by counsel, Phillip Sword.

The Respondent by counsel indicated during the December 15, 2021, hearing that she was working on a policy and that they only had to adopt a policy for (i)(2) (p. 15) to effectuate the amended statute taking the position that Petitioner had not demonstrated that he is entitled to extra good time and that Petitioner had not exhausted his administrative remedies. (pp. 7-12, 16)

The Petitioner argued that the purpose of the writ was to have the Respondent adopt a written policy to effectuate the purposes of the subsection which contained the mandatory “shall” language. (pp. 5-7, 17)

The Respondent not realizing counsel had been appointed to represent Petitioner had served a proposed Findings of Fact and Conclusions of Law on the Petitioner and the court prior to the hearing but not counsel for the Petitioner. The court gave Petitioner’s counsel 30 days to

file his prepared Findings of Fact and Conclusions of Law. Counsel filed his proposed order on 1/12/22 and confirmed receipt with the judge's law clerk.

On 1/13/22 the court signed the Respondent's proposed order. Counsel for Petitioner did not review the entered order as Respondent had not made a provision in the order for service on counsel for Petitioner. Counsel for Petitioner learned of entry of the order from the Petitioner. Petitioner files this appeal.

III. SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED BY NOT GRANTING A WRIT OF MANDAMUS REQUIRING THE RESPONDENT COMMISSIONER OF THE WEST VIRGINIA DEPARTMENT OF CORRECTIONS AND REHABILITATION TO DEVELOP A WRITTEN POLICY IN COMPLIANCE WITH W. VA. CODE § 15A-4-17(i)(2) TO EFFECTUATE THE PURPOSES OF W. VA. CODE § 15A-4-17(i).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner does not believe oral argument is necessary unless the Court determines that issues should be addressed in said manner. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

V. ARGUMENT

The trial court erred by not granting a writ of mandamus and issuing a rule to show cause requiring the Respondent Commissioner of the West Virginia Department of Corrections and

Rehabilitation to develop a written policy to effectuate the purposes of W. Va. Code § 15-4-17(i) regarding the award of good time under subsection (i) in compliance with W. Va. Code § 15A-4-17(i)(2). The Respondent has a non-discretionary duty imposed by the legislature to develop written policy to effectuate the purposes for the award of extra good time because of the mandatory language “shall” used by the legislature in writing the statute. Petitioner does not claim he is entitled to a specific award of good time but that the Respondent is required by the use of the mandatory “shall” to adopt a written policy to effectuate the purpose of the amendments to the good time statute.

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). 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).

Petitioner is a member of the class of persons that could benefit from the amendment related to earning extra good time. He may or may not qualify at this time and is not demanding extra good time as a right. The Petitioner has a right to have the commissioner adopt a written policy to effectuate the purposes of subsection (i) regarding eligibility for extra good time as required by the legislature’s use of the mandatory “shall”.

The mandatory language “shall” impose a legal, non-discretionary duty on the Respondent to adopt a written policy: “ It is well established that the word “shall, ” in the absence of language in the statute showing a contrary intent on the part of the legislature should be afforded a mandatory connotation.” There are a string of case with this syllabus point, including Syllabus Point 4 in Echard v. Holland, 177 W.Va. 138, 351 S.E.2d 51 (1986) and Woodring v. Whyte, 161 W. Va. 262, 242 S.E.2d 238 (1978) both cases interpreting good time statutes and their implementation.

In Woodring, the Commissioner failed to follow the directive of the new good time statute which required the classification of inmates in order to determine the good time credit they were to receive against their sentences. The statute created a classification committee directed to classify all prisoners, “ as soon as possible.” Class I inmates received 20 days per month. Inmates classified as Class II received 10 days per month. The “shall” language was that the above awards of good time shall be made. Until classified no good time could be awarded. The commissioner had done nothing to implement the statute.

This Court held “shall” means the Commissioner was required to classify the inmates according to the terms of the statute. The language “as soon as practical” did not imply discretion as to whether the classification may be made.

Shall in the instant case means the Commissioner shall adopt a written policy. She has indicated she does not intend to adopt a written policy. Her refusal violates her non-discretionary duty imposed by the legislature.

Petitioner has no other adequate remedy at law. Petitioner has exhausted his administrative remedies by filing grievances and writing directly to the office of the commissioner. Absent the written policy the legislature requires the Respondent to adopt to effectuate subsection (i), there is no way to determine if Petitioner may be eligible for extra good time or how to apply.

The Petitioner is not claiming he is entitled to extra good time in his writ of mandamus or this appeal. He is not arguing whether the provision providing for extra good time for meritorious services or performing extra assigned duties during emergency are to be read together or in the disjunctive. That is, does the clause “during emergencies” apply to both inmates who perform meritorious service and extra assigned duties during emergencies or does the use of the disjunctive “or” mean an inmate can receive extra good time for meritorious services at any time or performing extra assigned duties during emergencies. That issue is for another day.

The written policy required by the language, “shall adopt a written policy to effectuate the purposes of this subsection,” applies to both subdivisions (1) and (2) of subsection (i), not only (2) as argued by the Respondent. (p. 15). The written policy must address how to effectuate the purposes, (plural), of all of subsection (i). The use of the language subsection and purposes requires a written policy to effectuate the entirety of the subsection (i) including extra good time for meritorious service, performing extra duties during emergencies and 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 plan.

The sole issue before this Court is whether the Respondent is legally required to adopt a written policy to put subsection (i) into effect. The use of “shall” indicates that the commissioner has a non-discretionary duty to adopt a written policy to effectuate the purposes of both subdivisions (1) and (2) of subsection (i).


The Respondent has failed to adopt a written policy and by counsel has indicated she does not intend to adopt a written policy to effectuate both subdivisions of subsection (i) despite the mandatory language used by the legislature. The Respondent must adopt a written policy within a reasonable time. Since the Respondent indicates it does not intend to adopt a written policy for both subdivisions, (p. 15), the court below should have issued a rule to show cause requiring the Respondent to adopt written policy to effectuate W.Va. Code 15A-4-17(i)(1) (2) within 45 days.

It is well settled that in mandamus proceedings where a public officer willfully fails to obey the law, costs will be awarded. Syllabus Point 3, Nelson v. West Virginia Public Employees Insurance Board, 171 W. Va. 445, 300 S.E. 2d 89, 34 A.L.R. 4th 438 (1982). Since the Petitioner was required to expend his own limited funds to obtain performance of the Respondent of a mandatory duty, he is entitled to recover his expenses such as postage and copies. The Petitioner requests this Court to order the court below to allow the Petitioner to submit evidence in support of his claim for expenses for review by the court.

VI. CONCLUSION

The Court therefore finds that the Petitioner has a clear right to have the Commissioner adopt a written policy effectuating the purposes of awarding extra good time pursuant to W. Va. § 15A-4-17(i) as an inmate eligible for extra good time credit. Petitioner is in

the class of persons affected by the legislation and has a right to have a written policy provided under the statute so he may determine if he is eligible for extra good time and how to apply. The Respondent has a legal duty to adopt a written policy to effectuate the purposes of the statute related to extra good time. Petitioner has no other adequate remedy. The Petitioner request this Court to order the Respondent to adopt a written policy under W. Va. Code § 15A-4-17(i)(2) to effectuate the purpose of both subdivisions of subsection (i) within 45 days. Petitioner requests as the prevailing party in mandamus to submit evidence in support of his claim for expenses incurred in bring in this action to the court below and that the Respondent be ordered to pay expense incurred in bringing this action.

Signed 
Edward L. Bullman
West Virginia Bar ID 534
Counsel of Record for Petitioner

SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0109

STATE EX REL ARON FREELAND,

PETITIONER,

V.

**Case Nos. 22-0109
Kanawha County Circuit Court
Case No. 20-P-285**

**BETSY JIVIDEN, Commissioner for
The West Virginia Division of Corrections and Rehabilitation, et. al.**

RESPONDENT.

CERTIFICATE OF SERVICE

I, Edward L. Bullman, counsel for the Petitioner, ARON FREELAND do certify that service of the foregoing “**PETITIONER’S BRIEF AND APPENDIX**” was made upon the following this the 4th day of April, 2022.

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