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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0109

ARON FREELAND
Petitioner Below/Petitioner,

FILE COPY

vs.

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

Respondent Below/Respondent.

RESPONDENT'S SUMMARY RESPONSE
TO PETITIONER'S APPEAL

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Respondent, Betsy Jividen, Commissioner, West Virginia Division of Corrections and Rehabilitation, by counsel, Jodi Tyler, Assistant Attorney General, pursuant to Rule 16(h) of the West Virginia Rules of Appellate Procedure, submits the following Summary Response to the Petitioner's Appeal, perfected on May 4, 2022. For the reasons discussed below, Respondent asserts the Petition should be dismissed as Petitioner's claims relating to West Virginia Code §15A-4-17(i) are moot, in part, because the Respondent Commissioner adopted an amended version of written Policy Directive 151.06 (effective May 30, 2022) to effectuate the purposes of subsection (i)(2) of West Virginia Code §15A-4-17, relating to an inmates opportunity to earn extra "good time" credit for successfully completing an approved, but not required, academic or vocational program. The Petition should further be dismissed because Petitioner has failed to demonstrate a clear legal right to a written policy to effectuate the purposes of subsection (i)(1) of West Virginia Code §15A-4-17, relating to an inmate's opportunity to earn extra good time for meritorious service or performing extra assigned duties during emergencies. Lastly, the Petitioner should not be awarded expenses because Petitioner has failed to demonstrate an entitlement to the requested writ.

STATEMENT OF FACTS

Petitioner Aron Freeland, by and through counsel, Edward L. Bullman, presented a timely and complete "Notice of Appeal" from a final order of the Circuit Court of Kanawha County (Civil Action No. 20-P-285) entered on January 13, 2022. Petitioner perfected his appeal on May 4, 2022, through the filing of "Petitioner's Brief" and "Confidential Appendix Record." Petitioner is an inmate in the custody of the West Virginia Division of Corrections and Rehabilitation (hereinafter "WVDCR") and is currently being housed at Huttonsville Correctional Center. In 2005, Petitioner was sentenced by the circuit court of Monongalia County to "two consecutive terms of ten to

twenty-five years of incarceration” after being convicted of “two counts of second-degree sexual assault involving two different victims on two different days.” *See State v. Freeland*, No. 17-0361, 2019 WL 4391276, at *1 (W. Va. Sept. 13, 2019).

Petitioner is appealing an order of the Circuit Court of Kanawha County denying his underlying “Petition for Writ of Mandamus/Prohibition.” Appendix Record (hereinafter “A.R.”) at 134. In his appeal, Petitioner asserts one assignment 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).” Pet’r Br. at 4.

Petitioner specifically requests that this Court “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.” *Id.* at 12 (emphasis added). Petitioner further requests that the Respondent be ordered to pay expenses incurred in bringing this action. *Id.* Petitioner makes clear in his brief that he “does not claim he is entitled to a specific award of good time,” only that Respondent is required by W. Va. Code §15A-4-17(i)(2) to adopt a written policy to effectuate the purposes of the amendments to the statute relating to the ability of inmates to earn extra good time. *Id.* at 8. West Virginia Code §15A-4-17(i), provides:

(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.

W. Va. Code Ann. §15A-4-17(i) (West 2022) (emphasis added).

The Petitioner's underlying petition was based on his interpretation of West Virginia Code §15A-4-17 (2018), which provides:

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

However, during the pendency of the underlying action, this code section was amended and replaced.

On March 25, 2021, Senate Bill 713¹ was introduced by thirteen bipartisan 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 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.

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

¹ See http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=713&year=2021&sessiontype=RS.

approved and signed by the Governor on April 19, 2021. Senate Bill 713 changed this section to what it currently is, as cited above, which became effective April 30, 2021. *See* W. Va. Code Ann. §15A-4-17(i) (West 2022).

At the time Petitioner filed his “Notice of Appeal” on February 10, 2022, the Respondent had not yet finalized an updated version of WVDCR Policy Directive 151.06 “Good Time Computation” that incorporated the language of subsection (i)(2) of §15A-4-17, relating to the availability of additional good time credit, of up to ninety (90) days, for inmates serving felony sentences “who successfully complete an approved, but not required, academic or vocational program, which is not part of the inmate’s required individualized reentry programming plan.” W. Va. Code Ann. §15A-4-17(i)(2) (West 2022). Since the filing of the appeal from the Circuit Court’s Order denying mandamus relief, Respondent has finalized an amended version of Policy Directive 151.06, which became effective May 30, 2022. Section II of Policy Directive 151.06 now states, in relevant part:

An eligible inmate serving a felony sentence may be eligible to receive up to ninety (90) additional days of good time 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.

- A. Inmates who complete and academic/career development class listed on Attachment #1 and/or a career and technical education (CTE) class listed on Attachment #2, after the effective date of this Policy Directive, may request the corresponding days of additional good time. Not all classes are available at all facilities.
- B. Inmates enrolled in college courses through an accredited college or university authorized by the DCR may be eligible for one (1) day additional good time for each completed credit hour and ninety (90) days additional good time for an associate degree and one hundred, eighty (180) days additional good time for a bachelor’s degree.

WVDCR Policy Directive 151.06, Section II, (A)-(B). Supplemental Appendix (hereafter “S.A.” at 2-3. Policy Attachments #1 and #2 clearly list the approved classes that inmates may complete

to earn extra good time credits. S.A. at 5, 6. The policy goes on to provide the inmates with instruction on how to submit a request for consideration for the additional good time by completing Attachment #3. S.A. at 15.

Respondent asserts that the appeal should be dismissed as moot, in part, because such good time policy has been written and adopted by the Respondent Commissioner, as mandated by West Virginia Code §15A-4-17(i)(2). Petitioner's appeal should further be denied because he has failed to demonstrate a clear legal right to a written policy to effectuate the purposes of §15A-4-17(i)(1). Finally, Petitioner should not be awarded expenses for postage and copies because as explained below, he is not entitled to the mandamus relief requested.

STANDARD OF REVIEW

This Court has held that “[a] de novo standard of review applies to a circuit court's decision to grant or deny a writ of mandamus.” Syl. Pt. 1, *Harrison Cnty. Comm'n v. Harrison Cnty. Assessor*, 222 W. Va. 25, 26, 658 S.E.2d 555, 556 (2008).

ARGUMENT

I. THE PETITION FOR WRIT OF MANDAMUS IS MOOT, IN PART, BECAUSE RESPONDENT HAS ADOPTED A WRITTEN POLICY TO EFFECTUATE THE PURPOSES OF WEST VIRGINIA CODE §15A-4-17(i)(2).

Petitioner has not demonstrated a justiciable issue to the Court and therefore denial of mandamus relief is appropriate as the adoption of new Policy Directive 151.06 moots the issues presented in this case, as they relate to subsection (i)(2) of West Virginia Code §15A-4-17.

Petitioner filed this action as a writ of mandamus. “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). As Policy Directive 151.06 became effective May 30, 2022, there is no longer a legal duty on behalf of the Respondent Commissioner to create and adopt a written policy, as such duty has already been discharged.

“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). This 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)). This Court has stated “[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.” Syl. Pt. 5, *W. Virginia Educ. Ass’n v. Consol. Pub. Ret. Bd.*, 194 W. Va. 501, 460 S.E.2d 747 (1995) (citing Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908)).

Petitioner can no longer seek a writ of mandamus, as amended Policy Directive 151.06 became effective May 30, 2022. As mandated by West Virginia Code §15A-4-17(i)(2), the policy incorporates the language of subsection (i)(2) and provides guidance to eligible inmates on how they may earn extra good time for completing approved, but not required, academic or vocational courses. Accordingly, this Court should find Petitioner’s appeal moot on this claim, and the writ should not issue.

II. PETITIONER FAILED TO ESTABLISH A CLEAR LEGAL RIGHT TO A WRITTEN POLICY TO EFFECTUATE THE PURPOSES OF WEST VIRGINIA CODE §15A-4-17(i)(1).

As to Petitioner's argument that the Respondent was required to adopt a written policy to effectuate the provision of subdivision (i)(1), such argument is also without merit, and would further warrant dismissal of the Petition.

In both the 2018 version and the current version, relating to subsection (i)(1), 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)."

In 2018, the discretion was with the superintendent to recommend extra good time, with the approval of the commissioner, for exceptional work or service. There were no mandates in the 2018 version of the statute that required the Respondent to adopt a written policy to effectuate the purposes of subsection (i). The amendments provided by SB 713 clearly state that the discretion rests solely with the commissioner and limits extra good time credit to meritorious service or extra work performed during emergencies. Nothing in either West Virginia Code §15A-4-17(i) (2018) or the current version of §15A-4-17(i)(1) authorizes or requires the creation of a policy to determine extra good time credit for such acts. Therefore, the Petitioner has failed 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 circuit did not err in denying the underlying petition for writ of mandamus because Petitioner failed to demonstrate a clear legal right to a written policy to effectuate West Virginia Code §15A-4-17(i)(1) and further failed to demonstrate a nondiscretionary legal duty on Respondent to create such policy. Consequently, Petitioner’s appeal should be denied.

III. PETITIONER SHOULD NOT BE AWARDED EXPENSES BECAUSE HE HAS FAILED TO ESTABLISH THE NECESSARY ELEMENTS FOR A WRIT OF MANDAMUS TO ISSUE.

Petitioner also requests that the Respondent be ordered to pay expenses incurred in bringing this action. Pet’r Br. at 12. West Virginia Code §53-1-8 provides that a writ of mandamus may be awarded with or without costs, as the court or judge may determine. W. Va. Code Ann. § 53–1–8 (West 2022). In mandamus proceedings, costs will typically not be awarded against a public officer who is “honestly and in good faith endeavoring to perform his duty as he conceives it to be.” *Nelson v. W. Virginia Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) (citing *State ex rel. Koontz v. Board of Park Commissioners of City of Huntington*, 131 W.Va. 417, 47 S.E.2d 689 (1948)). “However, it is settled that in mandamus proceedings where a public officer willfully fails to obey the law, costs will be awarded.” *Nelson*, 171 W. Va. at 450, 300 S.E.2d at 91.

Here, Petitioner has failed to demonstrate that he is entitled to a writ of mandamus and should therefore not be awarded expenses. The Respondent has not willfully failed to obey the law as she has promulgated a policy directive that discharges her nondiscretionary duty under West Virginia Code §15A-4-17(i)(2). To the extent that the Court finds that the Respondent has not fully discharged her duty, in that she was also required to adopt a written policy to effectuate the purposes of subsection (i)(1), as argued by Petitioner, Respondent would maintain that costs should

still not be awarded since Respondent has "honestly and in good faith" promulgated a policy that she believes fully satisfies the mandate set forth in West Virginia Code §15A-4-17(i)(2).

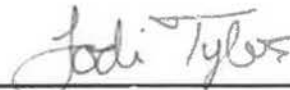
CONCLUSION

Based upon the foregoing, Petitioner has failed to identify any reversible error from the proceedings below and the circuit court's denial of Petitioner's writ for mandamus should be affirmed. Accordingly, Respondent, Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, respectfully requests that this Court deny this appeal, together with such other and further relief as the Court deems necessary and appropriate.

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

By Counsel,

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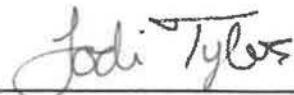
Division of Corrections and Rehabilitation,

Respondent Below/Respondent.

CERTIFICATE OF SERVICE

I, Jodi Tyler, Assistant Attorney General, hereby certify that service of the foregoing “Respondent’s Summary Response to Petitioner’s Appeal” was made on counsel for Petitioner by depositing a true copy in the United States Mail on the 15th day of June, 2022, addressed as follows:

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