

No. 91920-8

Received
Washington State Supreme Court

2 JUL 17 2015
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Ronald R. Carpenter
Clerk

IN THE
WASHINGTON STATE SUPREME COURT

In Re Personal Restraint of:

CLARK STUHR,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW
From:

Washington State Court of Appeals
Division II

No. 46988-0-II

Clark Stuhr
Stafford Creek Corr.Center
Unit H-1-B
191 Constantine Way
Aberdeen, WA 98520

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A. Identity of Moving Party

Movant CLARK STUHR, [hereinafter petitioner] requests this Honorable Court to review the Court of Appeals, Division II, decision designated in part B below.

B. Court of Appeals Decision

Pursuant to Rules of Appellate Procedure (RAP) Rule's 13.5A(a)(1),(b)(c); 13.4(b), and Rule 16.14(c), petitioner, through pro-se representation, moves the Court to Grant Review of the Washington State Court of Appeals, Division II decision in In Re Stuhr. A copy of that decision is attached here as Appendix "A".

C. Issues Presented for Review

1. Does a Washington State Department of Correction's Policy Directive (DOC 350.100), Which Permits DOC to Sanction a Prisoner's Future Good-time Credits, Before They Are Earned, in Conflict With RCW 9.94A.729(1)(a) Which Forbids the DOC from Crediting Prisoner's With good-time Credits Prior to the Credits Actually Being Earned?

2. Does Sanctioning All of a Prisoner's Future Good-time Credits Which Are Not Yet Actually

Earned Deprive the Prisoner of Due Process of Law?

3. Does Sanctioning All Future Good-time Credits on a Sentence Which Has Not Yet Commenced Deprive the Prisoner of Due Process of Law?

D. Standard of Review

When Challenging a prison disciplinary hearing officer's decision, the prisoner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. In Re Gronquist, 138 Wn.2d at 395; RAP 16.7(a)(2)(i). The prisoner must do more than base his contentions on speculation, conjecture, or inadmissible hearsay. Id., at 395; In Re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

Although a prisoner is not entitled to the full panoply of rights due a defendant in a criminal prosecution, several court's have held that "when evaluating the legality of a prison disciplinary decision which imposes as a sanction, isolation or mandatory segregation time," or loss of good conduct time, a limited number of procedural safe guards must be afforded. In Re Burton, 80 Wn.App.

57, 910 P.2d 1295 (1996); Dawson v. Hearing Committee, 92 Wn.2d 391, 597 P.2d 135 (1979); In Re Johnston, 109 Wn.2d 493, 745 P.2d 864 (1987); Wolf v. McDonnell, 418 U.S. 539, 563-66, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

"A prisoner is not wholly striped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the constitution and the prisons of this country". Id. "The touch-tone of due process is protection of the individual against arbitrary action of the government." Id., at 952.

In this case, petitioner was not provided with the minimum due process he was entitled to, where all of his future good conduct time credits were sanctioned, 2,947-days, which he had not actually yet earned.

E. Statement of the Case

(a) Relevant Facts

At several prison disciplinary hearings, petitioner was found guilty of numerous (WAC) rule violations, and was sanctioned with the loss of all his future good conduct time credits 2,947-days.

For cause No. 881001268 petitioner had the potential to earn a total of 2,832 days of good time credits, at a rate of 33% or 1/3. However, at the time of the infractions covering cause No. 881001268 from 1989-1991 petitioner could have only earned approximately, a maximum of 180-days. See Exhibit "1" to the PRP Record of Earned Release Time & Good Time for Cause No. 881001268.

In addition, for cause No. 911001143 petitioner had the potential to earn 115-days of good time credits at a rate of 33%. The (DOC) sanctioned petitioner with the loss of all 115-days of good conduct time associated with cause No. 911001143, however, because petitioner has not even began serving his sentence on cause No. 911001143 he has not yet earned any good conduct time on this cause.

F. Summary of Argument

The argument presented here, is that (DOC) has, by sanctioning good time credits which petitioner had not actually earned, arbitrarily deprived petitioner of his due process rights to his "State Created" liberty interests in his good time credits to which he is constitutionally and statutorily entitled.

This Court should accept review given the considerations set out in RAP 13.4(b)(3),(4). Both are satisfied here. First, the Court of Appeals decision is in conflict with Constitutional Due Process Principles. Second, the petition involves an issue of substantial public interest, namely whether the DOC's sanctioning a prisoner's future good conduct time under Policy Directive 350.100 is at odds with the legislatures intent, and plain meaning of RCW 9.94A.729(1)(a).

G. Argument Why Review Should Be Granted

I. DIVISION II'S HOLDING THAT THE DOC HAS AUTHORITY TO SANCTION A PRISONER'S FUTURE GOOD-TIME CREDITS BEFORE THEY ARE EARNED CONFLICTS WITH RCW 9.94A.729(1)(a) AND DUE PROCESS PRINCIPLES RAISING A SIGNIFICANT ISSUE OF CONSTITUTIONAL LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE REVIEWED. RAP 13.4(b)(3)(4).

(a) Petitioner Has a Protected Liberty Interests in his Future Good Conduct Time Credits.

In 1995 the U.S. Supreme Court decided Sandin v. Connor, 515 U.S. 472, 115 S.C. 2293 (1995), restricting the legal definition of "liberty" for prisoner's. Prior to Sandin Court's had held that if statutes or regulations sufficiently restricted the discretion of prison officials, they created a "liberty interest" and prison officials

had to provide fair procedures in order to take that interest away. See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462 (1989). These were often referred to as "state created liberty interests," though federal statutes and regulations could also create liberty interests. Sandin, disapproved of that kind of analysis, holding that it discouraged states from codifying their rules leading to greater federal intervention in day-to-day prison management. Id., at 515 U.S. 482. The Court had previously held that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.

For these reasons, Sandin held that prisoners should only be found to have a liberty interests in three circumstances: (1) when the right at issue is independently protected by the Constitution, (2) When the challenged action causes the prisoner to spend more time in prison, or (3) when the action imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life". Id., 515 U.S. at 484.

In Sandin, the U.S. Supreme Court reaffirmed its earlier holding that good-time, which was conferred by state statute and could only be revoked on a finding that the prisoner had committed serious misconduct, was an interests of "real substance" protected by due process. Id., 515 U.S. 477-78; (citing Wolf v. McDonnell, 418 U.S. 539, 557-58 (1974)).

Court's since Sandin have continued to hold that deprivation of good time requires due process protections where the relevant statutes and regulations sufficiently limit prison officials' discretion in taking good time. See Teague v. Quarterman, 482 F.3d 769, 777-80 (5th Cir. 2007)(holding that deprivation of any amount of good time is a liberty deprivation, rejecting argument that good time loss can be de minimis); Sanford v. Manternach, 601 N.W.2d 360, 66-68 (Iowa 1999)(holding that Iowa's good time statute creates a liberty interest because it would inevitably affect the length of time the prisoner served; after Sandin, the statute need not be mandatory to create a liberty interest).

In Washington State, Court's prior to and after Sandin have recognized that "where the State creates a right to good time credits", prisoner's have a "liberty

interest" under the Fourteenth Amendment to the United States Constitution in those credits, which prevents there deprivation absent observation of minimal due process requirements. In Re Piercy, 101 Wn.2d 490, 681 P.2d 223 (1984). An inmate has a constitutionally protected, though limited, liberty interest in good time credits, and thus, a Department of Corrections (DOC) action that wrongly denies an inmate credit for time served or good time earned would result in the unlawful restraint of the inmate. In Re Reifschneider, 123 Wn.App. 498 (2005); In Re Costello, 131 Wn.App. 828, 129 P.3d 827 (2006); In Re Fogle, 128 Wn.2d 56, 65-66 (1995); In Re Anderson, 112 Wn.2d 546, 548 (1989); In Re Erickson, 146 Wn.2d 576 (2008).

Here, the Acting Chief Judge of the Court of Appeals held in pertinent relevant part that:

DOC Policy 350.100, III-B.1 provides that "[o]ffenders found guilty of a serious violation may be sanctioned to a loss of earned or future conduct time ..." DOC Policy 350.100, II.B provides that an offender may lose early release time not yet served consecutive sentences. This is consistent with WAC 137-30-030(2)(b), which provides that "[o]ffenders may lose earned and future good conduct time if found guilty of certain serious infractions."

Petitioner argues that these policy provisions are at odds with RCW 9.94A.729(1), which provides that the Department may reduce an offenders term of confinement for good performance and good behavior and authorizes the Department to adopt rules and procedures for this process. And

explicitly states: "The correctional agency shall not credit the offender with earned early release credits in advance of actually earning the credits."

This statute simply prohibits the Department from crediting an inmate with early release time that he has not yet earned. Notably, it does not prohibit the Department from sanctioning petitioner by removing his ability to earn credits in the future. Petitioner's argument that this statute and DOC policy 350.100 are irreconcilable fails. Petitioner's past behavior resulted in these lawfully imposed sanctions and it was those disciplinary proceedings that implicated due process, not the Department inhibiting petitioner's ability to earn early release time in the future.

ORDER DISMISSING PETITION at 2. This reasoning of the Acting Chief Judge should be rejected for several reasons.

First, Washington State's "good time" statutes are similar to West Virginia's. And although the Chief Judge cites DOC recently revised (1/12/15) Policy Directive 350.100 which presumably permits DOC to sanction a prisoner with the loss of all future "good time credits", however, the statutory language provided by RCW 9.94A.729(1)(a) forbids the DCC from Crediting an offender [prisoner] with earned release credits before it is earned, thus, it conflicts with DOC Policy 350.100, and the statute controls. Infra.

Second, although the Chief Judge indicates that RCW 9.94A.729(1)(a) "does not prohibit the Department from sanctioning petitioner by removing his ability to earn

credits in the future", however, this is circular and contradictory reasoning. For instance, the DOC should not be able to take something under 350.100 which it cannot award under RCW 9.94A.729(1)(a). In other words, something not earned cannot be taken. The Virginia Supreme Court recognized this in Randy Bailey v. State of West Virginia, Division of Corrections, 2003 W.Va. LEXIS 72, 21 W.Va. 56, 584 S.E.2d 197 (2003), in which the Court held:

While we agree that sub-section (g) of the statute requires a computation of an inmates maximum potential good time, we are unpersuaded that this section demands a grant of an inmates good time at the outset of a sentence. Obviously, there are two important ingredients to each day of good time, first that the inmate serve one day in prison, and second that the inmate "be good" on that day. While some might find interesting the conceptualization of good time as a package of inchoate rights that, while granted upfront, only spring to life, or ripen, on days the inmate behaves, we are unmoved by this argument. Looking at the plain meaning of the words employed by the Legislature, we believe that when the statute says "good time which has been granted," it refers only to those days that an inmate has actually earned by being incarcerated and behaving appropriately.

2003 W.Va. LEXIS 72, at 16-17. Attached here as Appendix "B".

Moreover, as noted, such sanction imposed pursuant to DOC policy Directive 350.100 is contrary to statutory authority under RCW 9.94A.729(1)(a). which provides that:

. . . The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.

The above statutory language makes clear that a prisoner shall not be credited with earned release time credits [good time] in advance of the offender actually earning the good time credits. Thus, in this case, petitioner could not have lost good time credit that he had not earned at the time of the disciplinary action, which sanctioned him with the loss of all his "good time credits" under both causes. And as noted petitioner has not even started serving his sentence on cause No. 911001143, thus, DOC cannot sanction him with credits he has not earned.¹

(b) DOC Policy 350.100 Cannot Be Reconciled With the Plain Meaning of RCW 9.94A.729(1)(a).

If a statute's meaning or rule's meaning is plain and unambiguous on its face, then courts give effect to that plain meaning. Overlake Hosp. Ass'n v. Dep't of Health, 170 Wn.2d 43, 51 (2010). Although, a regulation

¹ The DOC could have only sanctioned petitioner with the loss of 180-days at the time of the disciplinary action, as that is all petitioner had actually earned at that time.

is entitled to "great weight", regulations "cannot amend or modify the statute in question". Pierce County v. Dep't of Revenue, 66 Wn.2d 728, 731 (1965). Administrative rules or regulations cannot amend or change legislative enactments." Dep't of Ecology v. Theodoratus, 135 Wn.2d 582 (1998). Regulations in order to be valid, must be consistent with the statute under which they are promulgated. Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013). "If a statute appears to conflict with a court rule or regulation, court's will first attempt to harmonize them and give effect to both." Putman v. Wenatchee Med. Ctr., 166 Wn.2d 97, 980 (2009). If the court rule or regulation cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Id.

Here, DOC Policy 350.100 B 1, which presumably permits DOC to sanction an offender with the loss of future good time credits, clearly conflicts with RCW 9.94A.729(1)(a), which provides that the "correctional agency shall not credit the offender with earned release time credits", because both the regulation and the statute's meaning's are plain and unambiguous on their face, and they cannot be harmonized, this being a

substantive matter, the statute controls, Id., and the DOC sanction of petitioner's future good time credits should be reversed.

Moreover, as indicated from the Virginia Supreme Court's decision in Bailey, if future good time credits can be lost for bad behavior that happens years before a prisoner actually earns those credits, then if he behaves in the future, but has lost all his good time for past behavior, then there is no incentive for a prisoner to ever behave for the remainder of his sentence. This scenario renders the legislatures reason for awarding good time meaningless. One provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless. United States v. Powell, 6 F.3d 611, 614 (1993); Accord Stone v. Chelan Cty. Sheriff's Dept., 110 Wn.2d 806, 809 (1988). A Statute must if possible, be construed in such a fashion that every word has some effect. Tellis v. Godinez, 5 F.3d 1314, 1316 (9th Cir. 1993); Powell, Id., at 614; (court avoids "any statutory interpretation that renders a section superfluous and does not give effect to all the words used).

This Court should Grant Review, follow the lead

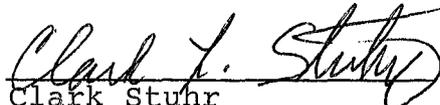
of the Virginia Supreme Court's decision in Bailey, Id., find that DOC's sanction of all of petitioner's good time credits under DOC Policy 350.100 was arbitrary & capricious, contrary to due process of law, Bailey, Id. Also see Weaver v. Graham, 450 U.S. 24, at 35 (1981); Dent v. West Virginia, 129 U.S. 114, 123 (1989), that DOC Directive 350.100 is at odds with RCW 9.94A.729(1)(a), and contrary to legislative intent in good conduct time credits.

H. Conclusion

For the reasons stated herein, and those previously submitted below, the Court should Grant Review and Order petitioner's good time credits restored. RAP 13.4(3),(4).

DATED this 12th day of July, 2015.

Respectfully submitted,


Clark Stuhr
Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II

2015 JUN 24 PM 1:54

STATE OF WASHINGTON
BY
DEPUTY

In the Matter of the
Personal Restraint Petition of

CLARK L. STUHR,

Petitioner.

No. 46988-0-II

ORDER DISMISSING PETITION

Clark L. Stuhr seeks relief from personal restraint imposed following his 1989 conviction of first degree murder and 1991 conviction of second degree assault. He does not challenge these convictions here; rather, he claims that the Department of Corrections has unlawfully deprived him of future earned early release time.¹

DOC Policy 350.100, III-B.1 provides that “[o]ffenders found guilty of a serious violation may be sanctioned to a loss of earned or future conduct time . . .” DOC Policy 350.100, II.B provides that an offender may lose early release time on not yet served consecutive sentences. This is consistent with WAC 137-30-030(2)(b), which provides that “[o]ffenders may lose earned and future good conduct time if found guilty of certain serious infractions.”

Petitioner argues that these policy provisions are at odds with RCW 9.94A.729(1), which provides that the Department may reduce an offender’s term of confinement for good performance and good behavior and authorizes the Department to adopt rules and

¹ Petitioner does not challenge his underlying infractions.

Appendix "A"

procedures for this process. And it explicitly states: "The correctional agency shall not credit the offender with earned early release credits in advance of actually earning the credits."

This statute simply prohibits the Department from crediting an inmate with early release time that he has not yet earned. Notably, it does not prohibit the Department from sanctioning petitioner by removing his ability to earn credits in the future. Petitioner's argument that this statute and DOC Policy 350.100 are irreconcilable fails. Petitioner's past behavior resulted in these lawfully imposed sanctions and it was those disciplinary proceedings that implicated due process, not the Department inhibiting petitioner's ability to earn early release time in the future.

As noted above, the Department has authority to reduce future earned time as a disciplinary sanction as set out in WAC 137-30-030 and DOC Policy 350.100. The authority to impose sanctions is vital to the Department's ability to maintain prison discipline and order. If the Department were unable to deduct future good time from a current or consecutive sentence, it would lose an important incentive for maintaining good prison behavior. Petitioner's claim fails. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 24th day of June, 2015.



Acting Chief Judge

cc: Clark L. Stuhr
Dept. of Corrections
Pacific County Cause No. 88-1-00126-8
Walla Walla County Cause No. 91-1-00114-3
Jean E. Meyn

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

No. 31148

FILED

June 19, 2003

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. RANDY BAILEY,
Petitioner

v.

STATE OF WEST VIRGINIA, DIVISION OF CORRECTIONS;
JAMES RUBENSTEIN, COMMISSIONER; MARK A. WILLIAMSON,
WARDEN; DENMAR CORRECTIONAL CENTER; AND WILLIAM S.
HAINES, WARDEN, HUTTONSVILLE CORRECTIONAL CENTER,
Respondents

WRIT OF MANDAMUS

WRIT GRANTED

Submitted: April 9, 2003

Filed: June 19, 2003

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The Opinion of the Court was delivered PER CURIAM

Appendix "B"

SYLLABUS BY THE COURT

1. “Before this Court may properly issue a writ of mandamus three elements must 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 the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.” Syl. pt. 3, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981).

2. “Good time credit is a valuable liberty interest protected by the due process clause, W. Va. Const. art. III § 10.” Syl. pt. 2, *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 265 S.E.2d 537 (1980).

3. “The provisions of West Virginia Code § 28-5-27 (1992) solely govern the accumulation of ‘good time’ for inmates sentenced to the West Virginia State Penitentiary.” Syl. pt. 3, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997).

4. “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).

Per Curiam:

I.
FACTS

This case concerns the revocation of a prisoner's so-called "good time" for violations of prison rules. As discussed, *infra*, West Virginia Code § 28-5-27 (1984) allows for a one day reduction in the time an inmate must serve for every day that inmate is incarcerated without disciplinary problems. Randy Bailey, petitioner, entered a plea of guilty to 3rd offense Driving Under the Influence in November 2001 in the Circuit Court of Cabell County. The court ordered Mr. Bailey to serve an indeterminate sentence of 1 to 3 years in prison. The Order of Commitment indicates that Mr. Bailey's conviction date was November 14, 2001, with an "effective sentence" date of November 13, 2001.

Pursuant to West Virginia Code § 28-5-27(g) (1984), prison authorities calculated Mr. Bailey's minimum discharge date to be May 13, 2003. That is, provided that Mr. Bailey did not have any discipline problems, he could earn one day good time for each day served and be released in eighteen months, rather than thirty-six months. After initial processing at the Mount Olive Correctional Complex in Fayette County, Mr. Bailey arrived on March 7, 2002 at the Denmar Correctional Center near Hillsboro in Pocahontas County.

Apparently Mr. Bailey did not adjust well to prison life, and he soon ran afoul of several prison rules. In his first three weeks at Denmar, Mr. Bailey allegedly created a disturbance and refused an order, both of which are violations of prison rules. Prison officials neither segregated Mr. Bailey nor did they deduct any good time for these two offenses, although they did revoke certain other privileges. Within one week of these initial troubles, Mr. Bailey allegedly committed four additional rule violations, including allegedly threatening to “knock someone’s head off,” being disruptive and raising his voice in a loud and threatening manner, refusing an order to use a sign in/out log, and refusing an assigned work detail.

Prison authorities memorialized each of these last four offenses by preparing a document called a Violation Report, specifying the wrongful conduct and noting the particular rule allegedly violated by Mr. Bailey. On April 11, 2001, a “magistrate”¹ held a series of hearings on these offenses, and in each case the magistrate found Mr. Bailey guilty.

¹W. Va. Code, §§ 31-20-8 and 9 (1998) create a Jail Facility Standards Commission and establish the duties and powers of that body. Pursuant to these code sections, Title 95, Series 1 of the Code of State Rules governs procedures for inmate rules and discipline. Specifically, section 16.15 states that “[d]isciplinary hearings of rule violations shall be conducted by an impartial person or panel of persons.” 95 C.S.R. § 95-1-16.15 (1996). The term used by the parties for this “impartial person” is “magistrate,” but this should not be confused with the magistrate court system created by W. Va. Const. Art. VIII § 10.

The magistrate entered three separate orders, each of which reduced Mr. Bailey's good time by six months. By notice dated April 18, 2002, prison authorities informed Mr. Bailey that he had lost a total of 18 months of good time and that his new minimum discharge date would be November 13, 2004.

As of the date of the notice, April 18, 2002, Mr. Bailey had only served 156 days of his sentence, thus, pursuant to W. Va. Code § 28-5-27(c) (1984), Mr. Bailey had only earned, in his view, 156 days of good time. The magistrate's orders took away not only these 156 days, but also took away every *possible* day of good time that Mr. Bailey could ever earn under his original sentence. Thus the decision of the magistrate, if left standing, would require Mr. Bailey to serve the entirety of his 1 to 3 year sentence.² Mr. Bailey subsequently attempted to appeal the magistrate's decision to the Commissioner of West Virginia Division

²Mr. Bailey could potentially regain some of his good time through a so-called "contract." As we noted in a recent case, "[p]ursuant to the authority granted by W. Va. Code § 28-5-27(f), the Commissioner of Corrections has implemented Policy Directive No. 151.02, which provides, in relevant part, the procedure to be followed for the revocation and restoration of good time credits." *State ex rel. Williams v. Dept. of Military Affairs*, 212 W. Va. 407, 413, 573 S.E.2d 1, 7 (2002).

Pursuant to this directive, inmates who have lost good time may enter into a contract with the Warden. If the inmate fulfills his or her obligations under the contract, he or she can regain some or all of the lost good time. However, an inmate's ability to participate in a contract is at the discretion of the Warden and the Commissioner. We believe that this is an important distinction, because under W. Va. Code § 28-5-27 (1984), the awarding of good time is not a discretionary act. Thus we do not believe that further discussion of this procedure is helpful to our decision in the instant case. For a thorough treatment of this issue, see *Williams, supra*.

of Corrections, Jim Rubenstein, to no avail. Mr. Bailey now petitions this Court for a writ of mandamus, ordering the respondents to return any good time days beyond the 156 days he had served as of the date of the notice. For the reasons set forth below, we grant the writ.

II. STANDARD OF REVIEW

Petitioner Bailey seeks a writ of mandamus. As this Court has noted on many occasions:

Before this Court may properly issue a writ of mandamus three elements must 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 the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.

Syl. pt. 3, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981); *accord*, *Parks v. Board of Review*, 188 W. Va. 447, 425 S.E.2d 123 (1992). We bear this standard in mind as we review the arguments of the parties.

III. DISCUSSION

Petitioner Bailey argues that the respondents violated the relevant code provision by taking from him over 547 days of good time when he had only been incarcerated for 156 days. In a nutshell, Mr. Bailey argues that a day of good time does not

exist until an inmate has served a day without incident, thus it should be impossible for prison authorities to take away more days of good time than an inmate has served.

First we note that good time “is designed to advance the goal of improved prison discipline.” *Woods v. Whyte*, 162 W. Va. 157, 160, 247 S.E.2d 830, 832 (1978) (citation and footnote omitted); *accord*, *State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 32, 537 S.E.2d 647, 653 (2000). Perhaps no place else are fairness and predictability more valued than within the walls of a prison. Those incarcerated have little to look forward to, and little to motivate them, beyond a return to their normal, free lives on the outside. It is vitally important to the orderly operation of our prisons that inmates believe they will be rewarded for good behavior.

As this Court has stated: “[t]he purpose of awarding good time credit is to encourage not only rehabilitative efforts on the part of the inmate by encouraging the industrious and orderly, but also to aid prison discipline by rewarding the obedient.” *Woodring v. Whyte*, 161 W. Va. 262, 275, 242 S.E.2d 238, 246 (1978); *accord*, *State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 32, 537 S.E.2d 647, 653 (2000).

This Court has described good time as “a purely statutory creation” *Woods v. Whyte*, 162 W. Va. 157, 160, 247 S.E.2d 830, 832 (1978), and the Court has often explained that it is the legislative, and not judicial branch that gave life to this practice: ““We repeatedly

have held that “[c]ommutation of time for good conduct is a right created by the Legislature.” Syl. pt. 8, in part, *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 (1978); accord, *State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 32, 537 S.E.2d 647, 653 (2000).” *State ex rel. Williams v. Dept. of Military Affairs*, 212 W. Va. 407, 414, 573 S.E.2d 1, 8 (2002).

However, once created by the state and granted to inmates, good time may not be taken away arbitrarily. As this Court has long held: “Good time credit is a valuable liberty interest protected by the due process clause, W. Va. Const. art. III § 10.” Syl. pt. 2, *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 265 S.E.2d 537 (1980). Accord, syl. pt. 3, *State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 446 S.E.2d 695 (1994); syl. pt. 2, *State ex rel. Coombs v. Barnette*, 179 W. Va. 347, 368 S.E.2d 717 (1988); syl. pt. 6, *State ex rel. Williams v. Dept. of Military Affairs*, 212 W. Va. 407, 573 S.E.2d 1 (2002).

As this Court explained in *Gillespie*, we have looked to the United States Supreme Court for guidance on this issue, and that Court has explained that the mere fact that good time is a legislatively created right does not permit the state to take it from a prisoner arbitrarily:

But the State having created the right to good time . . . the prisoner’s interest has real substance and is sufficiently embraced within Fourteenth Amendment “liberty” to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

Wolff v. McDonnell, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76, 41 L.Ed.2d 935, 951-52 (1974). However, *c.f. Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed. 2d 418 (1995), which held, with respect to segregating prisoners from the general prison population, that prisoners may not have a liberty interest in being free from punitive segregation.³

³The Court stated, in part:

The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. See also *Board of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, e.g., *Vitek*, 445 U.S., at 493, 100 S.Ct., at 1263-1264 (transfer to mental hospital), and *Washington*, 494 U.S., at 221-222, 110 S.Ct., at 1036-1037 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin v. Conner, 515 U.S. 472, 483-484, 115 S. Ct. 2293, 2300, 132 L.Ed. 2d 418, 429-30 (1995) (footnote omitted).

Or, as this Court stated in a more encompassing fashion, incarceration does not strip an inmate of all rights, or deprive him or her the expectation that the state will act in a reasonable and logical manner:

Our federal and state constitutions do not *give* liberty to people: they protect a free people from deprivation of their God-given freedom by governments. The entitlement to liberty and freedom must follow every citizen from birth to death, however mean or degenerate he may be viewed by his government or his peers at any given time along the way.

And so, the physical deprivation of his liberty must at every stage carry the burden upon the state to overcome the great presumption that he is a free man. His constitutional rights follow him into prison, or mental hospital, or military servitude, or wherever he is forced by the government to be.

Watson v. Whyte, 162 W. Va. 26, 29, 245 S.E.2d 916, 918 (1978).

Turning to the statute at issue, this Court has explained that, “[t]he provisions of West Virginia Code § 28-5-27 (1992) solely govern the accumulation of ‘good time’ for inmates sentenced to the West Virginia State Penitentiary.” Syl. pt. 3, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997); *accord*, syl. pt. 3, *State ex rel. Williams v. Dept. of Military Affairs*, 212 W. Va. 407, 573 S.E.2d 1 (2002). This statute first defines good time and explains for whom it is available and how it is calculated:

(a) All adult inmates now in the custody of the commissioner of corrections, or hereafter committed to the custody of the commissioner of corrections, except those committed pursuant to article four, chapter twenty-five of this code, shall be granted commutation from their sentences for good conduct in accordance with this section.

(b) Such commutation of sentence, hereinafter called "good time," shall be deducted from the maximum term of indeterminate sentences or from the fixed term of determinate sentences.

(c) Each inmate committed to the custody of the commissioner of corrections and incarcerated in a penal facility pursuant to such commitment shall be granted one day good time for each day he or she is incarcerated, including any and all days in jail awaiting sentence and which is credited by the sentencing court to his or her sentence pursuant to section twenty-four, article eleven, chapter sixty-one of this code or for any other reason relating to such commitment. No inmate may be granted any good time for time served either on parole or bond or in any other status whereby he or she is not physically incarcerated.

W. Va. Code § 28-5-27 (1984).⁴

Of course, once granted, good time may also be taken away from an inmate who has disobeyed the rules of the prison. The section of this statute that is the cynosure of this case states:

(f) The commissioner of corrections shall promulgate separate disciplinary rules for each institution under his control in which adult felons are incarcerated, which rules shall describe acts which inmates are prohibited from committing, procedures for charging individual inmates for violation of such rules and for

⁴The statute goes on to state, in part:

(d) No inmate sentenced to serve a life sentence shall be eligible to earn or receive any good time pursuant to this section.

(e) An inmate under two or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms thereof are added together, were all one sentence.

determining the guilt or innocence of inmates charged with such violations and the sanctions which may be imposed for such violations. A copy of such rules shall be given to each inmate. For each such violation, by an inmate so sanctioned, any part or all of the good time *which has been granted to such inmate* pursuant to this section may be forfeited and revoked by the warden or superintendent of the institution in which the violation occurred. The warden or superintendent, when appropriate and with approval of the commissioner, may restore any good time so forfeited.

W. Va. Code § 28-5-27 (1984) (emphasis added). Mr. Bailey argues that good time days are only granted to him for each day he has actually been incarcerated and been on good behavior. Thus, he claims, a maximum of 156 days of good time could have been granted to him as of April 18, 2002, so it was impossible for the respondents to have taken away more than 156 days.

The respondents argue that other requirements of the statute have the effect of forcing the state to “grant” good time days all at once at the commencement of an inmate’s sentence. Respondents point us to the following:

(g) Each inmate, upon his or her commitment to and being received into the custody of the commissioner of the department of corrections, or upon his return to custody as the result of violation of parole pursuant to section nineteen, article twelve, chapter sixty-two of this code, shall be given a statement setting forth the term or length of his or her sentence or sentences and the time of his minimum discharge computed according to this section.

W. Va. Code § 28-5-27 (1984).

We note that: “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). *Accord*, syl. pt. 1, *Peyton v. City Council of Lewisburg*, 182 W. Va. 297, 387 S.E.2d 532 (1989); syl. pt. 3, *Hose v. Berkeley County Planning Commission*, 194 W. Va. 515, 460 S.E.2d 761 (1995); syl. pt. 2, *Mallamo v. Town of Rivesville*, 197 W. Va. 616, 477 S.E.2d 525 (1996). Or in other words, “[i]n any search for the meaning or proper applications of a statute, we first resort to the language itself.” *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W. Va. 691, 696, 527 S.E.2d 802, 807 (1999); *accord*, *Affiliated Const. Trades Foundation v. University of West Virginia Bd. of Trustees*, 210 W. Va. 456, 466, 557 S.E.2d 863, 873 (2001).⁵

While we agree that sub-section (g) of the statute requires a computation of an inmate’s maximum *potential* good time, we are unpersuaded that this section demands a

⁵The Court has also held:

Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency’s rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

Syl. pt. 4, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W. Va. 691, 527 S.E.2d 802 (1999).

grant of an inmate's good time at the outset of a sentence. Obviously there are two important ingredients to each day of good time, first that the inmate serve one day in prison, and second that the inmate "be good" on that day. While some might find interesting the conceptualization of good time as a package of inchoate rights that, while granted up-front, only spring to life, or ripen, on days the inmate behaves, we are unmoved by this argument. Looking at the plain meaning of the words employed by the Legislature, we believe that when the statute says "good time which has been granted," it refers only to those days that an inmate has actually earned by being incarcerated and behaving appropriately.

We note that respondents argue that ruling in favor of Mr. Bailey could encourage new inmates, who have served little time and thus have little good time to lose, to misbehave, and that not allowing the prospective revocation of all possible good time strips the respondents of a valuable tool to control the inmate population. However, the obvious corollary to respondents' argument is that, once all the good time has been taken away from inmates like Mr. Bailey, the respondents will have then lost this tool anyway. Respondents argue that, to encourage good behavior from inmates who have lost all potential good time, they still may use the revocation of other privileges, or segregation. However, an equally strong argument can be made that these other tools may be used just as effectively on new inmates, who have little good time to lose.

Either way, at some point the respondents will have inmates who either don't have much good time to lose, or have already had their good time taken away. In either case, the respondents must resort to other means to control unruly inmates. With these two positions so equally balanced, we believe the plain meaning of the statute tips the scales and carries the day.

In the instant case, Mr. Bailey, who had been incarcerated only 156 days as of April 18, 2002, could have had a maximum of only 156 days of good time granted to him as of that date. We believe it was within the power of the magistrate to take away all of those days, but no more. Thus, we conclude that Mr. Bailey has a clear right to the relief he seeks, and that the respondents, collectively, have a legal duty to do that which Mr. Bailey seeks to compel, *i.e.*, the return of his good time taken in excess of 156 days. Moreover, Mr. Bailey has no other adequate remedy at law. In conclusion, we find it necessary to grant the requested writ of mandamus.

IV. CONCLUSION

For the reasons stated, we grant the requested writ of mandamus and order that respondents restore to Mr. Bailey all days of good time taken in excess of the 156 days he had actually earned as of the date of the magistrate's order.

Writ granted.

Certificate of Service

I CLARK STUHR, declare, certify and state under penalty of perjury under the laws of the United States of America and of the State of Washington that on the 16th day of July, 2015 I deposited into the United States Mail (postage pre-paid) a copy of PETITIONER'S MOTION FOR DISCRETIONARY REVIEW: addressed to: Assistant Attorney General, Corrections Division, P.O. Box 40116, Olympia, WA 98504-0116.

Clark L. Stuhr
SIGNATURE OF PETITIONER

DATE: July 16th, 2015

Received
Washington State Supreme Court

JUL 17 2015

Ronald R. Carpenter
Clerk

Tracy, Mary

From: Tracy, Mary
Sent: Friday, July 17, 2015 2:53 PM
To: Cleveland, Kim
Subject: 46988-0-II (Clark L. Stuhr) (SC# 91920-8)

Petitioner filed a motion for discretionary review of PRP. Please forward physical pouch to us.

Thank you,

Mary Tracy

Docket Specialist/Capital Case Manager

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