

FILED
COURT OF APPEALS
DIVISION II

2015 MAR 23 AM 9:07

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

In Re Personal Restraint of:)	
)	No. 46988-0-II
CLARK L. STUHR,)	
)	
Petitioner.)	PETITIONER'S REPLY
)	

I. Introductory Statement

CLARK L. STUHR, [hereinafter petitioner] who acting pro-se, pursuant to RAP 16.10(a)(2) hereby respectfully submits the following reply to the respondents [DOC] response to the current Personal Restraint Petition (PRP) for the Court's consideration.

Except as expressly admitted herein, petitioner denies each and every allegation of the response and re-affirms that his loss of all his good time credits is in violation of the Constitution's of the State of Washington and United States.

II. Issues Presented in Reply

1. Has Petitioner Presented the Court With Substantial Evidence That He Was Deprived of Due Process of Law When All Available Good Time Credits Were Revoked Prior to The Credits Being Earned?

2. Has Petitioner Supplied the Court With Authority For The Proposition That The DOC Cannot Revoke Good Time Credits Before They Are Actually Earned?

III. Arguments in Reply

A. THE EVIDENCE SHOWS THAT PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HE WAS SANCTIONED WITH THE LOSS OF ALL HIS GOOD TIME CREDITS PRIOR TO THE CREDITS BEING EARNED.

In responding to this issue, respondent contends that:

. . . The Department properly allotted a total of potential days of good conduct time to the 1988 cause at the commencement of Stuhr's incarceration at the rate set by statute and policy. . . Accordingly, the Department has created a process for awarding good conduct time and reducing it by sanctions for violation of disciplinary rules. That is not a process required by statute. It is solely a creature of policy. The statute does not create a liberty interest in maintaining the full balance of good conduct time credits because the statute does not direct a specific result in regard to the calculation of earned release time.

RESPONSE OF THE DEPARTMENT OF CORRECTIONS at 6-7. (citation omitted). For the reasons which follow, this Court should reject the DOC's arguments.

(a) Washington Prisoner's Receive Good-time on a Pro Rata Basis.

A prisoner held by the DOC earns "good conduct time" for good behavior on a pro rata basis for every

thirty days served, as allowed by crime category. See Good Conduct Time WAC 137-30-020(2)(d)(A Sentence reduction based on good conduct time will be established for each offender and computed on a pro rata basis for every thirty day period served, as allowed by the offender's crime category); Also see Former DOC Directive 350.100(II)(c). Thus, a prisoner like petitioner, may earn good conduct time for good behavior at a rate of 33% per 30-days served. Id.

A prisoner held by DOC may also accrue "earned time" for participation in approved programs. DOC Directive 350.100(III)(A). A program participant subject to the 33% rule earns credit at a rate of 5 days per calendar month. DOC Directive 350.100(III)(A)(1). Also see In Re Tally, 172 Wn.2d 642 (2011)(en banc).

Respondent's argument that it properly allotted a total of potential days of good conduct time to the 1988 case at the commencement of petitioner's incarceration should be rejected for several reasons.¹

¹ The respondent spends a great deal of time on cause No. 911001143 which petitioner has not even starting serving yet, and claims petitioner did not lose 115 days on this cause, however, DOC did deduct 70-days of good time on this cause. The DOC printout Ex. "1" to PRP is inconsistent with an earlier printout petitioner was provided with, which shows a loss of 115-days good conduct time. See Ex. "R-1" attached.

First, in the case relied upon in the Opening Brief of Petitioner at 9, the Supreme Court of Appeals of West Virginia held:

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 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.

RANDY BAILEY v. STATE OF WEST VIRGINIA, DIVISION OF CORRECTIONS, 2003 W. Va LEXIS 72, at 16-17, 213 W. Va. 563; 584 S.E.2d 197 (2003).

In addition to the Supreme Court of Virginia's decision here, and contrary to respondents position, RCW 9.94A.728(1)(former); RCW 9.94A.729(1)(a) indicates that:

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

Washington's "good-time" statutes are similar to West Virginia's. And although, DOC cites its recently revised policy Directive 350.100 that presumably allows it to take all earned and future good time credits, and earned time credits, however, the statutory language provided by RCW 9.94A.729(1)(a) forbids the DOC from crediting an offender with earned release time before it is earned, thus, it conflicts with the DOC policy directive 350.100, thus, the statute controls.

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 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 rule 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, court's will first attempt

to harmonize them and give effect to both." Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 980 (2009). If the statute and court rule "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 the DOC claims authorizes it to sanction an offender with the loss of earned or future good conduct time, conflicts with RCW 9.94A.728(1)(Former); 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 policy and statute thus, cannot be harmonized, this being a substantive matter, the statute controls. Id.

Moreover, as indicated above from the Virginia Court's decision, if future good time credits can be lost for bad behavior that happens years before the inmate 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 an inmate 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, 61 (1993); Accord Stone v. Chelan Cy. 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 any section superfluous and does not give effect to all the words used).

Second, although DOP 320.150(D)(3) indicates that earned time credits, whether earned or future credits, may be reduced under this directive, however, it specifically excludes offenders convicted prior to August 1, 1995 like petitioner.

(b) Washington Prisoner's Have a Liberty Interest in Good Conduct Time.

Due process bars arbitrary or wrongful government actions. Fouchia v. Louisiana, 504 U.S. 71, 72 (1992). And this applies to good time credits. Weaver v. Graham, 450 U.S. 24 (1981). If good time credits are improperly denied, then a prisoner "is . . . disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct. Weaver, at 35. The statutory right

to earned early release credits creates a liberty interest. In Re Crowder, 97 Wn.App. 598, 600 (1999); In Re Fogle, 128 Wn.2d 56, 65-66 (1995), citing In Re Anderson, 112 Wn.2d 546, 548 (1989). Liberty interests may arise from two sources: (1) The due process clause of the 14th Amendment, by reason of guarantees implicit in the word "liberty" and (2) State laws that create an expectation or interest in life, liberty, or property. In Re Cashaw, 123 Wn.2d 138, 14 (1994). Also see In Re McCarthy, 161 Wn.2d 234, 240-41 (2007)("A liberty interest may arise from the constitution.").

Washington has long recognized the 14th Amendments liberty interests in good time² as defined by Wolff v. McDonnell, 418 U.S. 539 (1974). See Anderson, Id; In Re Johnston, 109 Wn.2d 493 (1987). "Good time credits"

² Respondent also argues that RCW 9.92.151, which indicates that a correctional agency cannot credit earned time in advance of the offender actually earning the credits, only applies to county jails, however, "Good-time" credit refers to credit a prisoner receives for good behavior or good performance while incarcerated. "Good-time" credit is the familiar name for what the legislature refers to as "'earned early release time.'" In Re Williams, 121 Wn.2d 655, 658 (1993), and even if RCW 9.92.151 does only apply to county jails, RCW 9.94A.729(1)(a), RCW 9.94A.728(1)(former) does apply to DOC, and says the same thing as RCW 9.92.151.

are statutorily mandated by the legislature, and clearly create a "liberty interest".³ "A prisoner's statutory right to earn good time credits is a 'protected liberty interest in those credits which prevents their deprivation absent observation of minimal due process requirements'." Gronquist, 138 Wn.2d at 397. Also see In Re Taylor, 122 Wn.App. 880 (2004); In Re Dutcher, 114 Wn.App. 755, 758 (2002); In Re Erickson, 146 Wn.2d 576 (2008).

A DOC decision that wrongly denies an inmate good-time credits results in an unlawful restraint of the inmate and can be challenged in a PRP. RAP 16.4(c)(2,6); In Re Reifschneider, 123 Wn.App. 498 (2005).

IV. Conclusion

For the reasons stated herein, and in the previous filings, the Court should order petitioner's Good conduct time restored.

DATED this 19th day of March, 2015.

Respectfully submitted,


CLARK L. STUHR
Petitioner

³ The DOC's reliance on In Re Pullman, is misplaced. In Pullman, the Court was deciding a DOC risk assessment which recinded its earlier decision granting Pullman 50% off his sentence. That decision by DOC was not a statutory mandate by the legislature, but was a policy function by DOC, whereas, here, petitioner is statutorily entitled to 33% off his sentence.

Inmate: STUHR, Clark L (947192)

Gender: Male	DOB: 02/17/1967	Age: 44	Category: Regular Inmate	Body Status: Active Inmate
RLC: MOD	Wrap-Around: No	Comm. Concern: No	Custody Level: Maximum	Location: WCC-IMU — IMU / B107
ERD: 05/07/2025	Victim Sensitive: No	CC/CCO: Rishel, Rick L		

Earned Release Time Credits

Time Start Date: 09/09/1991	Earned Release Date: 05/07/2025	Days Remaining To ERD: 5061	Current Date: 06/29/2011	Suspension Date: 01/01/2010
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Good Conduct Time

Prefix	Cause Number	Consecutive To	Time Start Date	Potential Good Conduct Time	Good Conduct Time Lost	Available Good Conduct Time
AA	881001004					
AB	881001268		03/10/1989	2,832	2,832	0
AC	911001143	AB-881001268	02/03/2024	115	115	0
Combined Values:				2,947	2,947	0

Suspended Good Conduct GCT Available For Time: 0 Days
 Sanction: 0

Earned Time

Prefix	Cause Number	Consecutive To	Time Start Date	ERT %	Potential Earned Time	Earned Time Not Earned	Earned Time Earned	Available Earned Time
AA	881001004							
AB	881001268		03/10/1989	33.33%	1,415.83	689.40	480.93	245.50
AC	911001143	AB-881001268	02/03/2024	33.33%	57.43	0.00	0.00	57.43
Combined Values:				33.33%	1,473.26	689.40	480.93	302.94

Suspended Sanctions

Sanction Name	Sanction Status	Quantity Ordered	Quantity Ordered Indicator	Quantity Suspended	Quantity Suspended Indicator	Length Suspended (Days)	Date of Sanction Disposition	Infraction Group Number
There is no data to display.								

Exhibit "R-1"

Certificate of Service

I, CLARK L STUHR, hereby certify under penalty of perjury, under the laws of the State of Washington, and of the United States of America, that I served copy of PETITIONER'S REPLY on: JEAN MEYN, Assistant Attorney General, Corrections Division, P.O. Box 40116, Olympia, WA 98504-0116, by placing the same in the United States Mail (postage pre-paid) at the Stafford Creek Corrections Center.

Clark L. Stuhr
SIGNATURE OF PETITIONER

DATE: 3-19-15

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