

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 97-CA-0714-MR

MARK L. DYER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER CRITTENDEN, JUDGE  
ACTION NO. 96-CI-000986

KENTUCKY DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Mark L. Dyer (Dyer) appeals pro se from a February 11, 1997 order of the Franklin Circuit Court dismissing his petition for declaratory judgment brought pursuant to Kentucky Revised Statute (KRS) 418.040. After a review of the record, the arguments of the parties, and the applicable law, we affirm.

Dyer currently is an inmate at the Otter Creek Correctional Center. Between 1989 and 1996, Dyer participated in several informational programs involving a variety of subjects. Many of the programs were provided by either Department of

Corrections' employees or instructors approved by the Corrections Department. Many of these classes were conducted at the Northpoint Training Center including an employability skills course, a chemical awareness program, and an AIDS (Acquired Immunodeficiency Syndrome) education course. Dyer also received numerous certificates of completion from the Northpoint Training Center Jaycees for self-improvement classes, and he completed correspondence courses involving computers and paralegal studies. Finally, Dyer received credits from Ashland Community College and Lindsey Wilson College for courses in computer sciences.

In June 1996, Dyer filed a request with Corrections Department officials seeking 600 days of educational good time credit for the classes and courses he attended while incarcerated. The request was initially denied by the prison warden, so Dyer filed an administrative appeal to the Chief Educational Program Administrator of the Department of Corrections. The Program Administrator concurred in the decision denying Dyer educational good time credit, but he advised Dyer to reapply for credits after receiving a two-year associate diploma from Ashland Community College for his accredited college courses. On July 8, 1996, Dyer filed a motion for declaratory judgment in the circuit court seeking a court order declaring his right to receive educational good time credits pursuant to KRS 197.045 and Corrections Policies and Procedures (CPP) 20.1. The

Department of Corrections filed a response seeking dismissal of the petition and included an affidavit from Wendell McCourt, the Chief Educational Program Director. Dyer responded and, on February 11, 1997, the circuit court dismissed the petition for declaratory judgment. This appeal followed.

While the trial court merely dismissed the action, when parties file exhibits and affidavits in support of their position, as was done here, and these documents are not excluded by the trial court, the circuit court order dismissing is to be treated as a summary judgment. CR 12.03; Moss v. Robertson, Ky. App., 712 S.W.2d 351 (1986). The standard of review for summary judgment involves whether the trial court correctly found that there is no genuine issue of material fact in dispute and that the appellee was entitled to judgment as a matter of law. Moss, supra; Seigle v. Jasper, Ky. App., 867 S.W.2d 476 (1993). A party is not entitled to summary judgment unless it is shown with such clarity that there is no room left for controversy, and it appears impossible for the other party to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476 (1991). In the current action, the factual issues are not contested and only issues of law involving statutory interpretation are in dispute.

Dyer argues that under KRS 197.045, he is entitled to

receive educational good time credit for every course or class he completed while incarcerated. KRS 197.045(1)<sup>1</sup> stated as follows:

(1) Any person convicted and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days for each month served, except as otherwise provided in this section, to be determined by the department from the conduct of the prisoner. In addition, the department shall provide an educational good time credit of sixty (60) days to any prisoner who successfully receives a graduate equivalency diploma, a two (2) or four (4) year college degree, or a two (2) year or four (4) year certification in applied sciences, or who receives a technical education diploma as provided and defined by the department; prisoners may earn additional credit for each program completed. The department may forfeit any good time previously earned by the prisoner, or deny the prisoner the right to earn good time in any amount, if, during the term of imprisonment, a prisoner commits any offense or violates the rules of the institution.

As part of the authority granted to the Department of Corrections under KRS 196.035 and KRS 197.020 to issue administrative regulations, it promulgated CPP 20.1 to establish guidelines for educational programs and the granting of educational good time credits pursuant to KRS 197.045. CPP 20.1 sets out the requirements for participation by inmates in programs involving adult basic education, technical education,

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<sup>1</sup> KRS 197.045 was amended in 1996, but the amendments were not effective until July 15, 1996, so we will apply the version in effect in June 1996. In any event, the amendments would not substantially affect the outcome of the case.

college or university courses, a life management program, and correspondence courses. CPP 20.1(VI)(C) provides for educational good time credit for completion of the authorized programs upon recommendation to and final approval of the particular institution's warden and the central office of the Corrections Department.

Dyer argues that CPP 20.1 and KRS 197.045 created a constitutional liberty interest under the 14th Amendment of the United States Constitution, and Sections 2, 3 and 11 of the Kentucky Constitution in the granting of educational good time credit for "approved programs." He refers to mandatory language in KRS 197.045(1) indicating that "the department shall provide an educational good time credit of sixty (60) days to any prisoner . . . . who receives a technical education diploma as provided and defined by the department . . . ." Dyer contends that any completed program, course or class authorized under CPP 20.1 constitutes a technical diploma subject to educational good time credit. We disagree.

A protected liberty interest generally may arise from the Due Process Clause of the constitution and the laws of the states. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908, 104 L. Ed. 2d 506 (1989). Liberty interests may also be created through state government policy statements or regulations. Bills v. Henderson, 631 F.2d 1287,

1291 (6th Cir. 1990). In Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429-30 (1995), the Supreme Court indicated that in order to establish a state-created liberty interest, an inmate must demonstrate two factors: 1) the presence of state statutory or regulatory language creating "specific substantive limitations," intended to circumscribe the discretion of prison officials, Olim v. Wakinekona, 461 U.S. 238, 249-50, 103 S. Ct. 1741, 1747-48, 75 L. Ed. 2d 813 (1983), and 2) the imposition of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." See also Rimmer-Bey v. Brown, 62 F.3d 789, 790-91 (6th Cir. 1995) (inmate must prove existence of both mandatory language in regulation and atypical and significant hardship by statute or regulation). In cases such as this, the courts must analyze the "nature of the deprivation" for whether an inmate has suffered a "grievous loss" of liberty that results in atypical and significant hardship or that "will inevitably affect the duration of his sentence." Sandin, 515 U.S. at \_\_\_\_\_, 115 S. Ct. at 2298-302, 132 L. Ed. 2d at 431.

In assessing whether Dyer has a constitutionally protected liberty interest, we first must determine the "nature of the deprivation." It is well-established that a prisoner has no constitutional right to participate in specific educational or vocational programs. See Garza v. Miller, 688 F.2d 480, 485 (7th

Cir. 1982), cert. denied, 459 U.S. 1150, 163 S. Ct. 796, 74 L. Ed. 2d 1000 (1983); Archer v. Reno, 877 F.Supp. 372, 377 (E.D. Ky. 1985). Although the award of educational good time credits is based initially on the completion of education courses, the deprivation involved in this case is the denial of earned good time credits. Good time credits serve as an incentive for prisoners to act in a particular desired manner in return for a commensurate reduction in the amount of time served in prison on the original sentence.<sup>2</sup> First, in Wolff v. McDonnell, 418 U.S. 554, 558, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974), the Supreme Court held that state law may create a liberty interest in good time credits because they shorten the prison sentence and involve an interest of "real substance." Id. at 557, 94 S. Ct. at 2975; see also Sandin, 515 U.S. \_\_\_\_\_, 115 S. Ct. at 2297, 132 L. Ed. 2d at 430-431. Therefore, assuming Dyer had a right to the educational good time credits, the failure of prison officials to recognize and award him educational good time credit satisfies the second prong of the Sandin requirements because this will inevitably affect the duration of the sentence and represents more than a mere opportunity to earn good time credits.

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<sup>2</sup> In addition to educational good time, Kentucky law also provides for basic statutory good time credit related to good behavior and meritorious good time related to exceptionally meritorious behavior. See KRS 197.045.

The first prong of the Sandin requirements involves whether state law sets out sufficient specific limitations on prison officials that go beyond mere procedural guidelines. This analysis necessarily centers on the language of the state law for "mandatory directives" that create a reasonable expectation that a right or interest exists. See Hewitt, 459 U.S. at 471-72, 103 S. Ct. at 871; Olim v. Wakinekona, 461 U.S. at 245-46, 103 S. Ct. at 1745. In Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989), the Supreme Court clearly indicated that in addition to mandatory language, the statute or regulation must contain language creating "substantive predicates" with "particularized standards or criteria [to] guide the state's decisionmakers." Id. at 462, 109 S. Ct. at 1909 (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 467, 101 S. Ct. 2460, 2465, 69 L. Ed. 2d 158 (1981) (Brennan, J., concurring)).

An analysis of KRS 197.045 and CPP 20.1 reveals that these provisions do not create a federal due process liberty interest in the award of educational good time credits for the classes completed by Dyer. While the statute arguably creates a liberty interest for successful completion of a GED, a college degree or a certification in applied sciences, KRS 197.045 allows the Corrections Department to establish criteria for a technical education diploma. Moreover, CPP 20.1(IV) defines "Technical



Education" as "a post secondary vocational education program as set forth in 780 KAR 4:020." Under 780 KAR 4:020, which sets forth diploma requirements for vocational-technical education programs, a student must meet the following requirements for a diploma: 1) have earned a high school diploma or a GED; 2) meet the entry/exit requirements for the program; 3) complete all program requirements; and 4) pass an occupational achievement test (the Kentucky Vocational Achievement Test (KVAT) or an approved nationally test). Dyer has not shown that he has satisfied the above requirements or received a technical education diploma. Although CPP 20.1 contains some mandatory language, it contains no relevant mandatory language involving substantive predicates limiting prison officials' discretion in awarding educational good time credits for the type of courses completed by Dyer. As a result, even assuming he could satisfy the second prong of the Sandin requirements, Dyer has failed to satisfy the first prong, and thus has not established a protected constitutional liberty interest in being awarded educational good time credits.

Although Dyer refers to a constitutional liberty interest in educational good time credits, his position is based primarily on state statute and prison regulations. While he may have no federal constitutional right, Dyer's reliance on state statute and administrative law raises the issue of whether he has

a right to educational good time credits under state law. See Sandin, 515 U.S. at \_\_\_\_ n.11, 115 S. Ct. at 2302 n.11, 132 L. Ed. 2d at 432. However, Dyer has not shown a right to educational good time credits even under state law.

Dyer argues that he is entitled to educational good time credit for any completed class or course authorized by prison officials.<sup>3</sup> Dyer contends that KRS 197.045 requires the Corrections Department to award educational good time credit for all classes provided and defined by the department. Dyer's argument, however, is generated by artificially extracting various phrases from the statute and regulations in order to create an improper interpretation. A review of the entire statute and applicable regulations clearly establishes that not all classes available to inmates qualify for educational good time credits. CPP 20.1 describes the official policy for two separate and distinct programs, that being general education classes and courses subject to educational good time credits. Although related because both types involve educational issues, neither the statute nor the prison regulations require the

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<sup>3</sup> Dyer cites to an unpublished circuit court opinion to support his position. First, under CR 76.28(4)(c), unpublished opinions shall not be cited or used as authority in any other case in any court of this state. See also Goodlet v. Commonwealth, Ky. App., 825 S.W.2d 290 (1992). Second, we are not bound by a decision of a circuit court. Third, the unpublished opinion does not support Dyer's argument because it involves statutory language under a prior version of KRS 197.045 that has since been revised and does not apply to the current case.

Corrections Department to award educational good time credits for every class or course an inmate completes. Dyer attempts to fit his classes within the "technical education" language of KRS 197.045, but they do not fall within the type of courses classified as technical education under CPP 20.1. In fact, the majority of Dyer's classes fall within the general education type courses defined in the prison regulations under "life management" or "correspondence course."

"[I]n the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation." Revenue Cabinet, Commonwealth v. Gaba, Ky. App., 885 S.W.2d 706, 708 (1994). In addition, an agency's interpretation of a regulation is valid if it complies with the actual language of the regulation. Hagan v. Farris, Ky., 807 S.W.2d 488, 490 (1991). "In most cases, an agency's interpretation of its own regulations is entitled to substantial deference." Id. Generally, "where there is no clearly established judicial interpretation to the contrary, [courts] defer to prison officials' interpretation and application of their rules to the facts so long as that interpretation and application is not objectively unreasonable." Moorman v. Thalacker, 83 F.3d 970, 974 (8th Cir. 1996).

In the case at bar, the Education Program Director stated in an affidavit that educational good time credit is not awarded for life management or individual correspondence courses. The Corrections Department promulgated CPP 20.1 to set forth all the educational programs for inmates and it was not intended to describe an exclusive set of programs for educational good time awards. The Program Director stated that not all of the described programs in CPP 20.1 are eligible for educational good time. Life management classes, life skills classes and independent correspondence courses are not the type of classes that are eligible for educational good time credit under the statute. The Education Program Director denied Dyer's request for educational good time credit because his classes involved life management or correspondence courses or did not result in a two-year college degree. The prison officials' interpretation and application of the prison policies was reasonable. The prison officials did not violate state statutory or regulatory law in denying Dyer's application for educational good time credit. Consequently, the Corrections Department was entitled to summary judgment as a matter of law and the trial court did not err in dismissing the motion for declaratory judgment.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

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