

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1470

JAMES BURKS

VERSUS

LOUISIANA DEPARTMENT OF  
PUBLIC SAFETY AND CORRECTIONS

Judgment Rendered: APR 30 2015

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA  
DOCKET NUMBER 628392

HONORABLE WILLIAM A. MORVANT, JUDGE

\* \* \* \* \*

James Burks  
Cottonport, Louisiana

Plaintiff/Appellant  
Pro Se

William L. Kline  
Baton Rouge, Louisiana

Attorney for Defendant/Appellee  
Louisiana Department of Public  
Safety and Corrections

**BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.**

*Crain, J. dissenting and assigns reasons*

**McDONALD, J.**

Plaintiff-appellant James Burks, an inmate in the custody of the Department of Public Safety and Corrections, filed a petition for judicial review of a final agency decision (AVC-2013-753), concerning calculation of his good time release date, under the Corrections Administrative Procedure Act, La. R.S. 15:1171, et seq. The district court's Commissioner issued a rule to show cause, noting that the final agency decision was issued on December 23, 2013, and the petition for judicial review was not signed until February 4, 2014, well more than 30 days after the final decision was issued. The Commissioner ordered Mr. Burks to show cause within 40 days why the suit should not be dismissed for lack of appellate jurisdiction based on a failure to timely seek review within 30 days of receipt of the final administrative decision. Mr. Burks responded, arguing that there was no applicable 30-day preemptive period.

Thereafter, the Commissioner issued a report finding that the petition for judicial review was untimely, that Mr. Burks had failed to show proof to the contrary, and recommended that the petition be dismissed. The district court conducted a *de novo* review. Afterward, the district court adopted the Commissioner's report as its reasons for judgment, found that there was no subject matter jurisdiction, and dismissed the suit with prejudice. Mr. Burks has appealed that judgment.

Louisiana Revised Statute 15:1177(A) provides that an inmate aggrieved by an adverse decision of the Department may "within thirty days after receipt of the decision, seek judicial review of the decision only in the Nineteenth Judicial District Court." In order for the jurisdiction of the reviewing court to attach, the petition for judicial review must be timely filed. **Tatum v. Lynn**, 93-1559 (La. App. 1 Cir. 5/20/94), 637 So.2d 796, 797; Moreover, this thirty-day period is preemptive, rather than prescriptive, and may not be interrupted or suspended.

**Evans v. Louisiana Dep't. of Pub. Safety & Corr.**, 2013-1345 (La. App. 1 Cir. 4/25/14), 147 So.3d 195, 197; **Jones v. LeBlanc**, 2014-1005 (La. App. 1 Cir. 12/23/14), 2014 WL 7332301, \*1 (unpublished); **See also Carter v. Lynn**, 93-1583 (La. App. 1 Cir. 5/20/94), 637 So.2d 690, 691 (“Once the plaintiff [has] failed to seek judicial review within thirty (30) days as provided in La. R.S. 15:1177, his right to relief ceased to exist.”)

In the **Evans v Cain**, 2008-0377 (La. App. 1 Cir. 10/31/08), 2008 WL 4764030, the inmate filed his first petition for judicial review 37 days after the final agency decision was issued. Thereafter, the trial court dismissed his petition for judicial review as untimely. **Evans**, at \*1-2. On appeal, this court reasoned that because the record had no evidence of the date that Mr. Evans received the final agency decision, the Commissioner had wrongly seemingly relied on the date the DPSC’s final decision was rendered in determining the timeliness of the petitions for judicial review filed by Evans. This court reasoned that it was unable to determine whether the petition for judicial review was timely filed, found that the dismissal of the petition for lack of jurisdiction was improper, and thereafter considered Evans’ claim on its merits. **Evans**, at \*3-4.

In the **Evans** case, the Commissioner summarily dismissed the petition for judicial review without giving the inmate an opportunity to present evidence of the date of receipt of the final agency decision. In our case, after finding that the petition for judicial review was untimely on its face, the Commissioner ordered Mr. Burks to show cause why his petition should not be dismissed. Mr. Burks failed to respond to the rule to show cause with any evidence to show the date he received the final response, therefore, his petition for judicial review was dismissed.

Thus, we believe this case is distinguishable from **Evans**, as therein the inmate was not given the opportunity to present evidence of the date of his receipt

of the final agency decision, and in our case, Mr. Burks was given his opportunity to present proof of the date he received the final agency decision and he failed to do so. Further, we note that the Evans case involved a petition for judicial review signed 37 days (30 days plus one week) from decision rendered, and in our case the petition for judicial review was filed 43 days (30 days plus thirteen days) from the date the final agency decision was rendered.

After careful review of the record herein, we find that the record amply supports the judgment of the district court, and accordingly the May 28, 2014, judgment of the district court, dismissing Mr. Burks' petition for judicial review with prejudice, is hereby affirmed. **See Jones**, 2014 WL 7332301, \*2. Costs of this appeal are assessed to James Burks. This memorandum opinion is issued in compliance with Uniform Rules-Court of Appeal, Rule 2-16.1.B.

**AFFIRMED.**

**JAMES BURKS**

**STATE OF LOUISIANA**

**VERSUS**

**COURT OF APPEAL**

**LOUISIANA DEPARTMENT OF  
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 **CRAIN, J., dissenting.**

The 30-day preemptive period applicable to an inmate's petition for judicial review is triggered upon the inmate's *receipt* of the Department's final decision. La. R.S. 15:1177A. In *Evans v. Cain*, 08-0377 (La. App. 1 Cir. 10/31/08), 2008WL4764030, p.2, this court found that it was legal error to rely on the date the Department *issued* its final decision for purposes of determining whether the petition was timely filed. The same legal error was committed by the district court in this case, in which the record reflects the date the Department issued its decision, but not the date the inmate received it. Since the date the preemptive period began cannot be discerned, the district court's judgment dismissing this suit for lack of jurisdiction was improper.

The majority distinguishes *Evans* on the basis that the district court's Commissioner offered Burks "an opportunity to present evidence of the date of receipt of the final agency decision" through a rule to show cause, which was not offered to the inmate in *Evans*. I do not believe that difference materially distinguishes *Evans*. The record in this case still does not disclose the date Burks received the Department's final decision. Preemptive statutes must be strictly construed. *Rando v. Anco Insulations Inc.*, 08-1163 (La. 5/22/09), 16 So. 3d 1065, 1083. Without the critical date of receipt, the court cannot determine the date the

peremptive period began and cannot determine whether the petition was timely filed.<sup>1</sup> *Evans*, 2008WL4764030 at p.2.

Because the record does not establish the date Burks received the Department's final decision, I would reverse the judgment of the district court and remand this matter to the district court for further proceedings, specifically noting that the Department would not be precluded from filing an exception of lack of subject matter jurisdiction and supplying its own proof of the date Burks' received its final decision, if such proof is available.

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<sup>1</sup> The failure to require inmates to state the date of receipt in their petition for judicial review thwarts the judicial screening procedure and lends itself to a legislative solution.