

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

HENRY HILL, et al.,

Plaintiffs,

Case No. 10-cv-14568

Hon. Mark A. Goldsmith

vs.

GRETCHEN WHITMER, et al.

Defendants.

**OPINION & ORDER**  
**DENYING PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH JUDGMENT**  
**(Dkt. 240)**

This matter is before the Court on Plaintiffs' motion to compel compliance with judgment (Dkt. 240). On April 9, 2018, this Court entered a final partial judgment ordering Defendants to "cause to be calculated the good time and disciplinary credits for each subclass member . . . who has been resentenced, without regard to, or application of, Mich. Comp. Laws § 769.25a(6), for purposes of determining parole eligibility dates." 4/9/2018 Final Partial Judgment as to Count V (Dkt. 204). Plaintiffs contend that, for at least two subclass members, Defendants have refused to apply credits that they must apply under state law and Michigan Department of Corrections ("MDOC") policies, in violation of the April 9 Judgment. They ask this Court for an order compelling Defendants to comply with the April 9 Judgment. A hearing on Plaintiffs' motion was held on January 3, 2019. For the following reasons, the Court denies the motion.

**I. BACKGROUND**

On April 9, 2018, this Court entered a Judgment declaring that Michigan Compiled Laws § 769.25a(6) – which provides that individuals re-sentenced under Michigan's post-Miller v.

Alabama, 567 U.S. 460 (2012) sentencing scheme “shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant’s minimum or maximum sentence” – was unconstitutional, as violation of the Ex Post Facto Clause of the United States Constitution. See 4/9/2018 Final Partial Judgment as to Count V. The Court permanently enjoined Defendants from enforcing or applying Michigan Compiled Laws § 769.25a(6), and ordered that within fourteen days, “Defendants shall cause to be calculated the good time credits and disciplinary credits for each subclass member . . . who ha[d] been resentenced, without regard to, or application of, Mich. Comp. Laws § 769.25a(6), for purposes of determining parole eligibility dates.” Id.

MDOC Policies set forth the procedures for the award of good time and disciplinary credits. The warden at each facility must ensure that each prisoner has a designated “Good Time Committee,” consisting of the prisoner’s resident unit manager, a corrections officer assigned to the prisoner’s housing unit, and others. MDOC Policy Directive 03.01.100, Ex. 1 to Pls. Mot., ¶ I (Dkt. 240-2). The good time committee “shall be responsible for recommending to the Warden whether forfeited good time credits should be restored and whether Special Good Time credits should be granted on a prisoner’s minimum or maximum sentence, consistent with this policy.” Id., ¶ J.

Prisoners automatically accrue “good time” credits, id., ¶ L, but do not have a right to receive “special good time” credits, id., ¶ O. A prisoner is eligible for consideration for special good time credits only if he or she (1) “received consistently good to excellent assignment reports during the review period and made satisfactory progress toward completing reception facility recommendations” or (2) “performed a specific exemplary or meritorious act.” Id. The good time committee for each identified prisoner shall recommend to the Warden whether to grant the

prisoner special good time credits and if so, the amount to be granted. Id. ¶ R. After receiving the good time committee’s recommendation, the warden must determine whether to grant special good time credits. Id. ¶ S. The procedure for “disciplinary” credits and “special disciplinary” credits is virtually identical. MDOC Policy Directive 03.01.101, Ex. 2 to Pls. Mot., ¶¶ L, M, O, R, U, V (Dkt. 240-3).

Plaintiffs argue that Defendants did not follow the above-described policies when determining the amount of credits to award Plaintiffs James Howard and Dennis Johnson. Although Howard was eligible for 4,586 days of credit, and Johnson eligible for 4,495 days, both received zero days of credit. Pl. Mot. ¶ 13. Plaintiffs allege that if these two individuals had received even four percent of the credits available to them, they would have been immediately released on April 23, 2018, because they would have reached their maximum statutory sentences. Id. ¶ 16.

Randee Rewerts, the warden responsible for determining Howard’s credits, testified that he received a call from Deputy Director Ken McKee, and was told that Howard “wasn’t going to get any good time credits.” Randee Rewerts Dep. Tr., Ex. 5 to Pls. Mot., at 25 (Dkt. 240-6). Rewerts further stated that he told a deputy to “tell the [Good Time] Committee that he [Howard] was going to get zero,” something he had never done before and that would violate policy as he understood it. Id. at 33-34. Rewerts testified that he “was told that, if [Howard] was to get credits, that he would be out within the week, and we wouldn’t have time to prepare him for success on the other side.” Rewerts Dep. at 27.

Erik Balcarcel, the warden responsible for determining Johnson’s credits, testified that he did not review Johnson’s file, and the good time committee did not consider Johnson’s case or make a recommendation to the warden. Erik Balcarcel Dep. Tr., Ex. 6 to Pls. Mot., at 27-28 (Dkt.

240-7). Instead, Balcarcel was told that a decision on Johnson's credit would come from "Central Office." Id. at 28-29, 38-41. Balcarcel also testified that "we determined that [Johnson] would need his additional programming . . . in order to prepare to go back out." Balcarcel Dep. at 29.

## II. ANALYSIS

Plaintiffs argue that the violation of MDOC policy in Howard's and Johnson's cases runs afoul of this Court's April 9, 2018 Judgment. Although Howard had an expected parole release date of August 14, 2018, and Johnson was discharged from parole on July 18, 2018, Plaintiffs argue that Defendants "will continue to circumvent policies and avoid applying credits to any Plaintiff resentenced in the future whose proper calculation of credits would result in their release from prison due to good or exemplary behavior." Pls. Mot. ¶ 30.

In response, Defendants argue that the wardens have discretion in determining whether to award credits to prisoners. Defs. Resp. at 3 (Dkt. 247). They note that both Michigan Compiled Laws § 800.33 and Policy Directives 03.01.100 and 03.01.101 use the word "may," and these same policy directives state that prisoners do not automatically earn these credits. Defendants claim that the decisions to award zero credits to Howard and Johnson were not arbitrary, but were instead based on the rationale that prisoners who had been incarcerated for decades "should receive at least some release preparation before re-entering into the community[.]" Id. at 5. Defendants argue that they calculated credits in accordance with this Court's April 9, 2018 Order, and the wardens subsequently used their discretion to award zero special good time or special disciplinary credits to Howard and Johnson, which would allow time for release preparation.

Defendants are not in violation of the Court's April 9, 2018 Judgment. The Court ordered Defendants to calculate good time and disciplinary credits for class members without regard to Michigan Compiled Laws § 769.25a(6). Defendants have done so. While Plaintiffs argue that Defendants have circumvented established procedures, the details of the implementation of

MDOC Policies are not presently before this Court. If Plaintiffs believe that Defendants have violated their own policies or state law, any such contention would have to be set forth in a new claim and possibly a new suit. The Court intimates no view as to how such a claim may or should be brought, but the conduct challenged in the instant motion is not currently part of this action nor a violation of this Court's Judgment.

### **III. CONCLUSION**

For the reasons provided, Plaintiffs' motion to compel compliance with judgment (Dkt. 240) is denied.

SO ORDERED.

Dated: February 26, 2019  
Detroit, Michigan

s/Mark A. Goldsmith  
MARK A. GOLDSMITH  
United States District Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on February 26, 2019.

s/Kristen MacKay for Karri Sandusky  
Case Manager