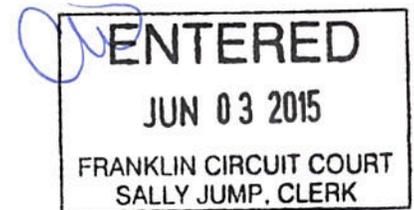


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
No. 12-CI-1208



ANTHONY ARRIOLA, ET AL

PLAINTIFFS

v.

OPINION AND ORDER

COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS, ET AL

DEFENDANTS

This action is before the Court following an evidentiary hearing and filing of legal briefs on the Plaintiffs' motion for declaratory and injunctive relief in this action arising out of a dispute over the practices of the Kentucky Department of Corrections ("DOC") in awarding Earned Good Time ("EGT") credit, allowing inmates to earn reduction in their sentences for the completion of educational programs approved by the DOC. EGT is the term used by all parties in this action to describe the sentence credits that are mandated by KRS 197.045 for inmates who successfully complete educational, civics or behavioral modification programs that are approved by the DOC under the statutory criteria. The Plaintiffs -who are all inmates- claim they have been unlawfully denied EGT and assert that the DOC wrongfully denies the awarding of credit, acts arbitrarily in deciding which programs are entitled to credit, fails to notify inmates of which programs are approved for EGT, and claim that the DOC has an outdated, unreliable and arbitrary system for keeping track of credits earned which results in the wrongful denial of EGT to many inmates. The DOC argues that its policies regarding EGT are discretionary and that the DOC complies with the minimum standard of statutory duties for the award of EGT. Although Plaintiffs seek only declaratory and injunctive relief, the DOC also asserts that it has immunity from Plaintiffs' claims.

CLASS CERTIFICATION

The Plaintiffs have requested class action status, and assert that they should be recognized as adequate representatives of the class of inmates who have been injured by the DOC's EGT policies. The record in this case establishes that the claims of the Plaintiffs are representative of the claims of a class composed of hundreds other inmates, who cannot all be practically joined as parties. Plaintiffs have demonstrated their ability to protect the interests of the class, that the issues presented in this case are all common to the class of inmates who seek the award of EGT, and that the Plaintiffs' claims here are typical of the claims of the entire class. *See* CR 23.01. The DOC has acted (or refused to act) on grounds that apply generally to the entire class of inmates in the EGT system. *See* CR 23.02(b). The Court takes judicial notice that it has pending on its docket many cases brought by individual inmates concerning these issues, and the prosecution of separate actions creates a risk of inconsistent or varying adjudications under CR 23.02(a). Accordingly, the Court **GRANTS** the motion for class certification under CR 23.02. *See Fitzpatrick v. Patrick*, 410 S.W.2d 143 (Ky. 1966).

Earned Good Time Credit under KRS 197.045

KRS 197.045 is a statute that awards Kentucky inmates Earned Good Time credit (EGT) or "sentence credit" for prior confinement based on educational accomplishment, good behavior, or meritorious service. The purpose of KRS 197.045 is to provide inmates with an education to enhance their employability while reducing recidivism rates and lowering incarceration costs for the state. Under the statute, Section 1, Subsections (a)(2)-(3) list the ways an inmate can earn credit on his sentence. An inmate shall receive credit for a sentence in the amount of ninety (90) days for each diploma, degree, or technical education program completed, and shall receive credit in the amount of not more than ninety (90) days for completing a drug treatment program

or other evidence-based behavioral modification/rehabilitative program approved by the Kentucky Department of Corrections (DOC).

The Plaintiffs in this case allege that the EGT credit system in Kentucky prisons is administered by the DOC in an arbitrary and capricious manner that disregards governing statutes and policies. Plaintiffs assert that the DOC does not have a reliable system in place for tracking inmates' educational achievements and awarding EGT where appropriate. Plaintiffs also argue that the Defendants do not have a rational basis for denying EGT credit to inmates for completion of numerous programs offered at its institutions. The Defendants respond that the DOC has the discretion to administer the EGT credit system, and limitations on the DOC's ability to deny EGT would be contrary to the law -with the exception set forth in the *Roberts*¹ decision (prohibiting the DOC from denying inmates EGT credit for additional or related diplomas, degrees, certifications). The Defendants dispute the Plaintiffs' claim that there is no reliable system in place for tracking inmates' educational achievements and assert that the DOC has a reliable computerized system (known as the Kentucky Offender Management System or KOMS) for managing this information.

The Defendants and Plaintiffs are in agreement that the version of KRS 197.045 that took effect in June of 2011 removed the discretion of the DOC to deny inmates EGT credit for similar or related degrees, and that this outcome is also mandated by the Kentucky Court of Appeals decision in the *Roberts* case.² The DOC asserts that in situations not involving awards of EGT for related or additional degrees, it retains discretion to decide when and if an inmate will receive an award of EGT credit.

¹ *Roberts v. Thompson*, 388 S.W. 3d 519 (KY Court of Appeals, 2012).

² *Id.*

In this case, the Plaintiffs seek injunctive and declaratory relief establishing that the DOC has no discretion to deny EGT credit to inmates for vocational certificates earned, and that the DOC has no discretion to deny EGT credit to inmates for successful completion of behavioral/rehabilitative programs that are “evidence-based” and “approved.” Additionally, Plaintiffs seek retroactive award of EGT for approved courses they have completed. Finally, the Plaintiffs seek injunctive and declaratory relief in the form of an order requiring the DOC to publish and circulate among inmates information regarding which courses and programs will and will not grant an inmate EGT credit upon successful completion.

The Defendants argue that injunctive relief is inappropriate because the named-defendants are state employees engaging in discretionary duties. The Defendants further argue that the appropriate remedy in this case is a writ of mandamus and that Plaintiffs have not requested such relief. Additionally, the DOC asserts that it has never awarded EGT credit for certificates and that not all of the behavioral/rehabilitative programs it offers are “evidence-based” and entitle inmates to EGT credit upon completion. The DOC also argues that KRS 197.045 has never been found to apply retroactively and that there are no provisions in the law allowing the retroactive award of EGT credit for degrees earned prior to the date of the statutes enactment. Lastly, the Defendants claim that inmates at its institutions have no right to participate in educational or behavioral/rehabilitative programs and no accompanying right to information regarding those programs.

HISTORY OF KRS 197.045

KRS 197.045 has been amended numerous times; each amendment has served to broaden the scope and application of the statute. It was amended in 2010 to increase the EGT award from sixty (60) to ninety (90) days. In 2011 it was amended to remove the DOC’s discretion to deny

EGT credit for completion of additional or related courses. A 2010 amendment changed the language from “*graduate* equivalency diploma” to “*general* equivalency diploma” and provided for EGT credit for behavioral modification courses including “a drug treatment program or other program as defined by the Department (DOC) that require participation in the program for a minimum of six (6) months.” The statute was amended in 2011, adding “a civics education program that requires passing a final exam” to the list of courses for which an inmate can receive EGT credit. In 2013, the Kentucky state legislature made three changes to the statute: (1) it changed the requirement language from “technical education *diploma*” to the broader “completed technical education *program*”; (2) it added an “online or correspondence education program” to list of approved courses; and (3) it added an “evidence-based program approved by the Department” (DOC) to the Drug Treatment Program previously approved and it removed the six (6) month participation requirement.

Both Plaintiffs and Defendants cited the unpublished decision in *Roberts v. McGowan*,³ though each side imparted a different legal significance to the case. In *McGowan*, which was decided under the version of KRS 197.045 that awarded EGT credit for completion of a “technical educational *diploma*,” an inmate was denied EGT credit that he claimed he was entitled to for obtaining two (2) vocational certificates. The majority found that “the common and ordinary usage of the word *diploma* prohibits us from concluding that McGowan’s certificates are equivalent to technical education diplomas, as used in KRS 197.045.”⁴ Judge Combs dissented, arguing that the majority interpretation was too narrow, and that certificates were typically awarded for completing a technical program and should therefore merit an award of EGT credit. Plaintiffs argue that the 2013 amendment to the statute, deleting the requirement

³ *Roberts v. McGowan*, 2010-CA-000642-MR, 2011 WL 3759627 (Ky. Ct. App. Aug. 26, 2011).

⁴ *Id.*

of “*diploma*” and replacing it with completion of a “technical education *program*” appears to directly relate to the result in *Gowan* and broadens the list of qualifying courses to include ones for which inmates are awarded vocational certificates. The Defendants, on the other hand, argue that *McGowan* stands for the proposition that vocational certificates are not the equivalent of a technical education diploma and that the Court found McGowan’s arguments to the contrary in that case to be unpersuasive. In its discussion of the *McGowan* case, the Defendants’ did not address how the 2013 amendment to KRS 197.045 is indicative of the legislature responding to the result reached by the Court in *Gowan*.

FINDINGS OF FACT

Substantial testimonial evidence was introduced during the hearing held at the Kentucky State Reformatory (KSR) on March 13th, 2014. This evidence contributes to an understanding of the issues raised by the parties to this case. Based on the testimony and exhibits entered into evidence at the hearing, and on the parties post-hearing briefs and exhibits, the Court makes the following findings of fact:

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1. The Kentucky Community and Technical College System (KCTCS) was in charge of all correctional education in the Kentucky penal system until 2010. In 2010, the DOC took over administration of the vocational programming provided to inmates. The Plaintiff inmates in this case had involvement with both systems. Each Plaintiff introduced a “Degrees Conferred” printout showing their coursework from the period when KCTCS directed educational programming; a “Program Achievements” printout showing their coursework after the DOC took over the vocational programming; and a “Resident Record” card reflecting the EGT credits they were

awarded. Each Plaintiff also provided a "Sentence Credit/Debit" printout showing the months that they were awarded EGT.

2. The DOC administration of the EGT system is arbitrary and capricious, as demonstrated by the testimony of Plaintiff Keath Bramblett. Mr. Bramblett's testimony established that the DOC (through its Kentucky State Reformatory, or KSR) refuses to award EGT for certificates obtained from the KCTCS, but will award EGT for certificates obtained from KSR's own educational programs. (TR, *Bramblett Testimony*, at 21-22). In response to a question from attorney Belzley as to whether KSR ever provided him (Bramblett) with an explanation as to why he got EGT for a certificate DOC issued, but not for one issued by KCTCS, Mr. Bramblett stated: "they haven't given me a detailed explanation other than that they have the right to decide who gets what." (TR, *Bramblett Testimony*, at 22-23).
3. Mr. Bramblett's testimony also established that DOC has never explained the rationale under which the DOC awarded or denied EGT credit and that there has never been any documentation to which inmates could refer to determine whether or why EGT for a course would be awarded or denied. "There's never been anything to articulate or breakdown exactly what it is you would receive EGT for." (TR, *Bramblett Testimony*, at 28). No explanation has been given to Mr. Bramblett as to why he has been awarded EGT credit for a vocational certificate after vocational programming was taken over by the DOC, while still being denied EGT credit for the vocational certificates he earned when KCTCS was administering the vocational programs. (TR, *Bramblett Testimony*, at 22-23).

4. During Mr. Bramblett's testimony, Plaintiffs' Exhibit 16 was introduced. This Exhibit consisted of a comprehensive list of all courses (vocational, educational & evidence-based) offered to inmates in the Kentucky penal system. Mr. Bramblett testified that he had never seen Plaintiffs' Exhibit 16. (TR, *Bramblett Testimony*, at 32). This comprehensive listing of courses has not been published or made available to inmates, who are left to guess which courses are accepted by the DOC for the award of EGT and which ones are not.
5. The testimony further established that the DOC's system for tracking EGT and making sure that each inmate receives the credits earned is arbitrary and unreliable. Mr. Bramblett testified about a memo (Plaintiffs' Exhibit 11) that was issued by the DOC academic school coordinator at KSR searching for inmates who may have been denied EGT credit: "It was a memo posted in all units at KSR by the academic school coordinator stating that if you were denied educational good time, EGT... while you are incarcerated, you could report to the school." (TR, *Bramblett Testimony*, at 15). Yet it was also established that Mr. Bramblett has taken a number of courses which appear in Plaintiffs' Exhibit 16 (Comprehensive List of Programs Offered) but do not appear on his DOC Program Achievement printout, and that he has not been provided with any explanation for this discrepancy. (TR, *Bramblett Testimony*, at 33-35).
6. The testimony further established that in some cases EGT credit is only awarded after the inmate obtains a paper certificate from the accrediting institution and that some inmates have been waiting as long as a year for certificates and still have not received them. (TR, *Bramblett Testimony*, at 41-42). Mr. Bramblett's DOC

“Program Achievements” printout does not show all the courses he has taken since the DOC took over the vocational programs. (TR, *Bramblett Testimony*, at 84-85). Mr. Bramblett testified that there are twenty-four (24) course completions listed in his KCTCS “Degrees Conferred” printout and his DOC “Program Achievements” printout, but that his “Resident Record” card (listing amount of EGT awarded) shows that he has received only nine (9) awards of EGT credit during his incarceration. (TR, *Bramblett Testimony*, at 84-85).

7. Mr. Bramblett testified that the DOC would not award him EGT credit for a course entitled “Malachi Dads.” (TR, *Bramblett Testimony*, at 315-316). Mr. Bramblett’s testimony established that inmates in the “Malachi Dads” program use the same workbook and curriculum as those in “Inside/Out Dads” and that “Inside/Out Dads” is only a six month program, whereas “Malachi Dads” lasts a year. (*Id.*). The DOC offered no rational explanation as to why two programs using the same curriculum were treated differently for the award of EGT. The DOC asserted that the “Inside/Out Dads” program had well-established credentialing requirements for instructors, but the testimony established that “Inside/Out Dads” was taught by a well known and well respected Louisville attorney, Scott Dickens. (Tr. at 315-16).
8. Mr. Bramblett also testified about the DOC’s implementation of “Umbrella Programs” under which an inmate is awarded EGT only upon completion of all the programs under a particular umbrella/grouping, and not for each individual program as it is completed. (TR, *Bramblett Testimony*, at 36-38). Mr. Bramblett further testified that the DOC initiated this new “Umbrella Program” regime without

providing inmates any notice or explanation. (TR, *Bramblett Testimony*, at 38-39).
See also, Defendant's Exhibit 1.

9. Mr. Bramblett testified about one of the "Umbrella Programs" entitled "VT Fundamentals" and how the DOC would award credit retroactively for some courses/components that make up "VT Fundamentals" but not for others. (TR, *Bramblett Testimony*, at 39). Mr. Bramblett also testified that under the "VT Fundamentals Umbrella" both a GED and a course called National Career Readiness Certificate (NCRC) were required and that the DOC would allow credit to be retroactively awarded for a GED but not for the NCRC program: "They (DOC) were saying particularly that the NCRC Certificate is not retroactive...but they're applying the GED retroactively... So it's like a pick and choose on which person gets it and which don't." (*Id.*). According to Mr. Bramblett's testimony "qualifying" courses completed under KCTCS prior to DOC's takeover of vocational programming could not be counted toward a vocational certificate and that inmates were not allowed to retake a qualifier course that they had taken earlier in order to fulfill all the requirements for successful completion of an "Umbrella Program." (TR, *Bramblett Testimony*, at 39-40).
10. Lastly, Mr. Bramblett testified that during a 2011 audit of his EGT he had ninety (90) days taken away from him on the grounds that it was in a related field. (TR, *Bramblett Testimony*, at 60). Mr. Bramblett testified that the credit was later restored "after the filing of this law suit." (TR, *Bramblett Testimony*, at 60).
11. The testimony of Plaintiff Christopher Hopper also supports the Court's finding that DOC administers the EGT program in an arbitrary and capricious fashion. Mr.

Hopper testified that he wrote to Ms. Slemp, the Corrections Education Manager, because the DOC had taken three (3) separate diplomas he had earned and combined them all into one EGT award of ninety (90) days. (TR, *Hopper Testimony*, at 93).

Mr. Hopper's KCTCS "Degrees Conferred" printout and his DOC "Program Achievements" printout show that he has completed thirty-three (33) programs while incarcerated. Like Mr. Bramblett, Mr. Hopper testified that he has taken a number of courses listed under Plaintiffs' Exhibit 16 (Comprehensive Course List) that do not appear on his DOC "Program Achievements" printout. (TR, *Hopper Testimony*, at 87-89). Mr. Hopper testified that his "Resident Record" card shows that he has received only nine (9) awards of EGT. (TR, *Hopper Testimony*, at 89-90).

12. In addition to testifying that his "Resident Record" card is incomplete, Mr. Hopper testified that it is his position that his "Resident Record" card is missing at least twenty-four (24) completed courses for which he should have been awarded EGT. (TR, *Hopper Testimony*, at 88-90). Also like Mr. Bramblett, Mr. Hopper has not received EGT for vocational certificates he obtained when KCTCS ran the vocational programs. (TR, *Hopper Testimony*, at 96).
13. Mr. Hopper testified that in August of 2012 he received a letter from the DOC informing him that he could not get credit for three (3) separate diplomas he had earned because they were too related. Then, following the filing of this law suit he received another letter retracting what he had been told in the previous letter and informing him that he would be granted three (3) separate awards of EGT credit for each diploma earned. (TR, *Hopper Testimony*, at 103-104).

14. Plaintiff Walter Nolan's testimony further supports the Court's finding that the DOC's administration of the EGT program is arbitrary and capricious. Mr. Nolan testified that his situation is similar to that of Mr. Bramblett and Mr. Hopper. He has completed numerous courses while incarcerated that do not appear on his DOC "Program Achievements" printout. (TR, *Nolan Testimony*, at 106-107).
15. Mr. Nolan's KCTCS "Degrees Conferred" printout and his DOC "Program Achievements" printout show that he has completed at least twenty (20) programs while incarcerated. However, Mr. Nolan's "Resident Record" card (showing amount of EGT credit) only lists six (6) awards of EGT credit. *See Plaintiffs' Exhibit 36 and 36A*. Additionally, Mr. Nolan testified that on his "Program Achievements" printout, a course he had not taken was listed. (TR, *Nolan Testimony*, at 106-108). Mr. Nolan also testified that he had been asked on three (3) separate occasions to provide the Education Office at KSR with copies of the degrees and certificates and diplomas he has earned in order to determine whether he has been awarded all the EGT credit he has earned. (TR, *Nolan Testimony*, at 109-110).
16. Plaintiff Anthony Arriola's KCTCS "Degrees Conferred" and his DOC "Program Achievements" printout show that he has completed at least twenty-one (21) programs while incarcerated, and like the other plaintiffs, he asserts that he has earned several certificates that do not appear on his DOC "Program Achievements" printout. (TR, *Arriola Testimony*, at 119-121, 126-127). Mr. Arriola's "Resident Record" card only lists nine (9) instances where he has been granted EGT credit. (TR, *Arriola Testimony*, at 122).

17. Mr. Arriola testified that if he had received all the EGT he was entitled to, he would have already been released and would no longer be serving time. (TR, *Arriola Testimony*, at 122-123).
18. Martha Slempp, the DOC's Education Branch Manager, testified for the Defendants, and Ms. Slempp asserted that DOC has the administrative discretion to pick and choose which of its programs offered to inmates qualify for EGT. Ms. Slempp based much of her testimony on Defendants' Exhibit #22, entitled "*KOMS Achievements*." Ms. Slempp testified that Exhibit 22 was a comprehensive list of all the vocational programs available at Kentucky penal institutions. Ms. Slempp testified that Exhibit 22 was prepared for DOC's counsel to use at the hearing, and that the DOC does not circulate a similar document to inmates to inform them of the differences between the course offerings, or to inform them of what they will or will not be awarded EGT credit for. (TR, *Slempp Testimony*, at 173-174).
19. Ms. Slempp was not able to provide a clear answer, when questioned as to whether an inmate could "assume" that a course offered in the institution where he was incarcerated was one that was "approved and defined" by the DOC. (TR, *Slempp Testimony*, at 231).
20. Ms. Slempp testified that Corrections Policy 20.1 is the only Correction's Policy that discusses instances where the DOC can deny inmates EGT credit. Of the four instances listed under CPP 20.1, Ms. Slempp admitted 2 were eliminated by the Kentucky Court of Appeals decision in the *Roberts* case. (TR, *Slempp Testimony*, at 207-208). Ms. Slempp also testified that to her knowledge, the DOC has not

promulgated any guideline or regulation governing how EGT credit is awarded.

(TR, *Slemp Testimony*, at 223-224)

21. Ms. Slemp's testimony included answering questions about the reliability of the DOC's system for tracking inmates EGT credit. Ms. Slemp testified about the DOC's loss of certificates it had requested in order to update inmates' EGT credit history. (TR, *Slemp Testimony*, at 190-191). Ms. Slemp provided conflicting testimony in regard to what branch of the DOC is responsible for handling corrections when there is an error regarding the award or denial of EGT credit. On the one hand Ms. Slemp testified that it was the responsibility of the Records Branch unless it was a new achievement and then the individual "school" would handle it. On the other hand, a letter from the Records Branch to an inmate stated that the inmate would need to contact the Education Branch (which Ms. Slemp directs) for a correction. Ms. Slemp maintained her office at the Education Branch was not responsible for making decisions about corrections. However, in a letter introduced during the hearing, Ms. Slemp informed an inmate that her office could "recommend" that a prior award of EGT credit be voided. (TR, *Slemp Testimony*, at 192-195).
22. Briney King, an Offender Information Administrator for the DOC testified that Ms. Slemp's "recommendations" were actually "directives," and that they were always followed in the absence of some obvious error. (TR, *King Testimony*, at 276-278).
23. Ms. Slemp testified that under the direction of the DOC, inmates now get EGT credit for the program and not the certificate. (TR, *Slemp Testimony*, at 152). During cross-examination, testimony elicited from Ms. Slemp showed that no

guidelines exist regarding what constitutes a “program” versus what constitutes a “certificate,” in spite of the importance of these terms under KRS 197.045 and court decisions that have interpreted it. (TR, *Slemp Testimony*, at 166-169).

24. Ms. Slemp also testified that she simply objected to an inmate getting ninety (90) days of EGT credit for a certificate that only took ten (10) hours to earn. Ms. Slemp also testified that she could not show where the law or DOC policies and procedures said that an inmate could not get ninety (90) days EGT credit for a certificate that took ten (10) hours to complete. (TR, *Slemp Testimony*, at 217).
25. Ms. Deborah Kays, an Internal Policy Analyst III for the DOC, testified in regard to the DOC’s behavioral modification programs. According to her testimony, the inmates are not provided with information indicating which behavioral modification programs are evidence-based and therefore eligible for EGT credit, as to be distinguished from programs which are merely “promising practices” and will not entitle an inmate to EGT credit. (TR, *Kays Testimony*, at 247-248). Ms. Kays also testified that an inmate would have no way of knowing whether a facilitator of an evidence-based program had the credentials to teach the program which would impact whether the inmate would be entitled to an award of EGT credit upon completion. (TR, *Kays Testimony*, at 260).
26. The DOC’s method of tracking and maintaining data regard the award of EGT to inmates, through the Kentucky Offender Management System (KOMS) is unreliable, and results in the denial of sentence credit to inmates who have earned it. When a dispute arose over discovery of these issues, and the Court directed DOC to provide additional data in response to Plaintiffs’ discovery request. The DOC instructors at

various institutions provided the names of 33 inmates who had been denied EGT credit since 2012, and whose names were not reflected in the data produced by DOC through the KOMS system. *See Defendants' Response to Plaintiffs' Interrogatory No. 1.*

27. Inmates seeking a reason for the denial of EGT do not have access to an explanation through Department Policy. Exhibit B from Plaintiffs' Reply Brief contains a "Grievance Notification" informing a prisoner that his appeal of the Department's decision not to award EGT credit "has been deemed non-grievable for one or more of the following reasons in accordance with CPP 14.6" and the box marked "Other" is checked, with a typed note stating "EGT is non-grievable." (Plaintiffs' Reply Brief, Exhibit B).
28. The amendment of the statute in 2013 to provide for EGT for a "completed technical education program" was designed to broaden the scope of programs that entitle inmates to EGT, in response to the decision in Roberts v. McGowan, 2011 WL 375627 (Ky. App. 2011) that limited EGT sentence credits to programs leading to a "diploma, degree, or certification"
29. The Rand Corporation study, "Evaluating the Effectiveness of Correctional Education" (Exhibit B to Plaintiff's Reply Brief), demonstrates that "correctional education reduces post-release recidivism and does so cost-effectively" and "may increase [post-release] employment." (*Id.* at iii). This same factual finding was endorsed by the General Assembly in the 2013 amendments to the statute, and DOC noted that those amendments were "necessary to enhance the work begun by House

Bill 463 with the mission of increasing public safety, while reducing incarceration costs.” *Plaintiffs’ Exhibit 50, Slemp Testimony, Tr. at 209-2012.*

CONCLUSIONS OF LAW

1. The denial of EGT is a deprivation of due process in violation of the 14th Amendment to the U.S. Constitution, and Sections 2 and 3 of the Kentucky Constitution, if the denial is arbitrary and capricious. Richardson v. Rees, 283 S.W.3d 257 (Ky. App. 2009). Here, the DOC policy rests wholly on the subjective judgments of its employees, without reference to any statute or administrative regulation that sets forth objective criteria for the granting or denying of sentence credit. As demonstrated by the evidence in this case, this subjective system results in arbitrary decisions. As the Court held in *Rees*, “EGT credit, under limited circumstances, is a protected liberty interest entitled to due process protection. ... Where the Commonwealth has created a right to a good time credit which has not been awarded, there is a Fourteenth Amendment ‘liberty’ implicated, entitling inmates to minimum procedures required by the due process clause to insure that the state-created right is not arbitrarily abrogated.” *Id.* at 263-64.
2. The DOC is under an obligation to notify inmates of which courses and programs qualify for EGT and which ones do not. The state statute creating the right to EGT, KRS 197.045, gives rise to a constitutionally protected liberty interest that cannot be impaired without due process of law. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Sandlin v. Conner, 515 U.S. 472 (1995).

3. Inmates are entitled to a retroactive award of EGT credit for certificates earned at least since July 15, 2011 and are entitled to a retroactive award of EGT credit for behavioral modification programs completed at least since June 25, 2013.
4. The 2013 amendment to KRS 197.045 expressly provides that subsection 1(a)(2) of the statute be applied retroactively to July 15, 2011.
5. The provisions of KRS 197.045 that extend the award of EGT to completion of “evidence based programs” (KRS 197.045(3)) should be applied retroactively to July 15, 2011, under the decision of the Kentucky Supreme Court in Commonwealth v. Thompson, 300 S.W.3d 152 (2009).
6. The actions of the DOC in this case meet the established standard for arbitrary administrative action. In denying credit for programs that meet the statutory criteria of KRS 197.045, the DOC acted beyond its statutory powers; by failing to give notice to inmates of which courses were approved and which were not, the DOC denied the Plaintiffs procedural due process; and in many cases involving the named Plaintiffs, the DOC failed to offer substantial evidence in support of its decision to deny EGT. Taken as a whole, the record here clearly establishes the arbitrary nature of DOC’s administration of the EGT program. Richardson v. Rees, 283 S.W.3d 257, 264 (Ky. App. 2009).
7. The DOC’s Policy 20.1(II)(C)(2), which provides that EGT must be denied for inmates who have received prior EGT in “a related area” and inmates “whose record indicates a proficiency in the same area,” is inconsistent with KRS 197.045, as applied by the Court of Appeals in Roberts v. Thompson, 388 S.W.3d 519, 520-21 (Ky.App. 2012). As the Court held in *Roberts*, the 2011 amendment of the KRS

197.045 requires the award of 90 days EGT credit “per diploma, degree, or certification received.” *Id.*

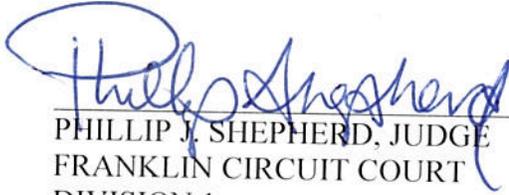
8. The DOC’s administration of the EGT program has been arbitrary and capricious, and the Plaintiffs are entitled to declaratory and injunctive relief.

CONCLUSION

For the reasons stated above, the Plaintiffs are granted **JUDGMENT** under CR 57 and KRS 418.040 on their claims for declaratory relief that the DOC’s administration of KRS 197.045 is arbitrary and capricious, and that the DOC’s conduct has denied the Plaintiffs’ right to due process and equal protection of the law under the 14th Amendment to the U.S. Constitution, and Sections 2 and 3 of the Kentucky Constitution. The Court **RESERVES** ruling on the remedies for the constitutional and statutory violations found herein, pending further proceedings to address the appropriate scope of injunctive relief and to explore the availability of other remedies, including mediation, that can fairly and efficiently address the violations found by the Court. The Court, as noted above, **GRANTS** the Plaintiffs’ motion for class certification under CR 23.02, and certifies the named Plaintiffs as class representatives for the class of inmates incarcerated by DOC who have sought, or are seeking, the award of sentence credits under KRS 197.045 through completion of educational or behavior modification programs offered by DOC for the time period of five years preceding the filing of this action.

Counsel for the parties are directed to appear at a pretrial conference on Monday, June 15, 2015 at 10:00 a.m. at the Franklin County Courthouse (Historic Courtroom) to address the remaining issues concerning appropriate injunctive relief and remedies in this case. This is not a final order.

Dated: 6-3-15


PHILLIP J. SHEPHERD, JUDGE
FRANKLIN CIRCUIT COURT
DIVISION 1

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