07 January 2005

FedCURE Position Paper.

Analysis: Flaw in H.R. 4752 (LERA)

Our attention in this paper focuses on a flaw in H.R. 4752, cited as the “Literacy, Education, and Rehabilitation Act” (LERA). The problem is with Title 18 USC Section 3624, *(See: Appendix),* the statute LERA seeks to amend, specifically, the phrase *"term of imprisonment."* Other issues and arguments are set out in foot notes below.

The Bureau of Prisons' interprets this phrase to mean: *"term of imprisonment served" vs. "term of imprisonment imposed."* This is evidenced by the bureau's promulgation of a regulation interpreting this provision as awarding GCT [good conduct time] on the basis of "each year served." 28 C.F.R. § 523.20. In Program Statement 5880.28, the bureau has set forth the formula it uses to calculate GCT. Under the bureau’s formula, an inmate that receives a sentence of one year and one day can earn up to 47 days of GCT rather than 54 days. This has been bureau policy for almost 20 years.

The exact legal meaning of the phrase *"term of imprisonment"* was the subject of recent litigation, *White v. Scibana, 314 F.Supp.2d 834 (W.D.Wis. 2004)*, the pivotal issue of which is the phrase “*term of*

imprisonment" as used in the current statute: § 3624(b). It states that an inmate *may* earn up to 54 days of good conduct time "at the end of each year of the prisoner's term of imprisonment." LERA does not amend this statutory section and uses this exact phrase, in its Section 2, Subsection (c)(1), offering 60 additional days of GCT. In *White*, *supra*, this clause raised the question whether the phrase *"term of imprisonment"* means *"sentenced imposed"* or *"time served."* If *"term of imprisonment"* refers to the sentence, an inmate's maximum potential good conduct time could be calculated by multiplying 54 days by the number of years in the sentence. In that case, petitioner would have been eligible to earn up to 540 days against his sentence (54 days x 10 years = 540 days). However, if a term of imprisonment is defined by the inmate's actual time served, the number of

good time credits that could be earned would be reduced and a more complicated calculation would be required because an inmate that earns good time will not actually serve his full sentence. The court ruled in favor of inmate petitioner and ordered: "Respondent [Bureau of Prisons] is directed to recalculate petitioner's good conduct time on the basis of each year of his *sentence* rather than on time actually served."

This ruling applied only to petitioner, *Yancey White*. The bureau appealed, taking the position that 54 days of GCT may be earned for each full year *served* on a sentence in excess of one year, with the GCT being prorated for the last partial year. Since an inmate will not be *in service* of a complete 120 months (for example), he or she cannot calculate his/her GCT credits by multiplying 120 months by 54 days. Applying this formula, each inmate is entitled to 470 days

GCT for a 120-month sentence. The Seventh Circuit U.S. Court of Appeals agreed with the bureau and reversed the U.S. District Court's ruling, deciding to "[D]efer to the Bureau's reasonable interpretation of the statute, which awards the credit for each year served in prison rather than each year of the sentence imposed." *White vs. Scibana, No. 04-2410P (U.S. C.A. 7, December 2nd, 2004). URL: http://caselaw.lp.findlaw.com/data2/circs/7th/042410p.pdf* .

Consequently, if LERA were to become law, as it is written, the bureau will undoubtedly continue to apply the formula found in P.S. 5880.28, *ante*, to LERA, which has been bureau policy for 20 years or more and now affirmed by *White*, *ante*. Since LERA tracks the language of the current subsection of the statute (3624(b)(1)) and uses this exact phrase in adding an amendment for an additional 60 days of GCT (LERA at 3624(c)(1)), it is inherently flawed, including but not limited to: A loss of 7 GCT days per year under subsection (b)(1) and 9 GCT days per year under subsection (c)(1). Moreover, the Seventh Circuit's decision in *White* and LERA's current language make the result clear: A total abrogation--the gutting--of the very provisions LERA's promoters advertise, *i.e.*, its retroactive provisions, and the possibility for an inmate to receive up to an additional 60 days of GCT off a sentence after participating in stated programming. n.1/.

It is inconceivable why anyone would want to expend valuable advocacy resources towards promoting legislation that has been proven to be flawed; has no provisions for funding; and cannot possibly be implemented by the Bureau of Prisons. LERA can serve

no goodly purpose. To the contrary, this proposed legislation, if passed, would only tax an already burdened federal prison system by creating havoc and turmoil within the Bureau of Prisons between staff and inmates. n.2./.

Therefore, we conclude that LERA must be amended to clearly state that the computation of its GCT provisions is to be based on the *"term of imprisonment imposed"*. To do otherwise, in light of the circumstances presented herein, would be irresponsible.

FedCURE declines to support H.R. 4753 (LERA) in its present form for the reasons noted herein.

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Notes:

n.1./

It is noted that LERA and the current statute allows good conduct time only for those

prisoners serving a term of imprisonment of more than one year. LERA and the statute says also that the inmate *may* receive 54 days of credit for every "year of the prisoner's term of imprisonment." (emphasis). LERA would add an additional 60 days. LERA's provisions and the current statute use the word *may*, not shall.

Whereas, award of good conduct time days of credit are at the sole discretion of the bureau and its employees. This additional award is conditional, based on a number factors and inmate must meet. LERA unwisely leaves it up to the bureau to determine what these factors are. Additionally, LERA makes no provision for authorization of funds to implement this legislation. Furthermore, "Credit that has not been earned may not later be granted." *LERA at Sec. 2(c)(1*), meaning that an inmate cannot receive the additional LERA credits towards years already served. This negates LERA's retroactive "Eligibility" provision. *LERA at Sec. 2 (c)(4).*

Lastly, LERA discriminates among classes of inmates, in that, it leaves out people serving both non-parolable and parolable life sentences. A parolable lifer would have to serve thirty (30) years and would not be eligible under LERA to receive any CGT days. Why?

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n.2./

This issue is by no means a new one. In fact, for the past "several years, the Federal Defenders, the National Association of Criminal Defense Lawyers (NACDL) and FAMM have worked to challenge the Bureau of Prisons (BOP) misinterpretation of the federal good-time statute." *FAMM GRAM at p .1. (Summer 2004).*

Surely, LERA's authors knew or should have known of these challenges, not to mention the *White* decision, *ante.* "The collective impact of those currently in federal prison is more than 27,000 years of over-incarceration, at a cost of over $683 million." *FAMM GRAM at 22, supra.* To have introduced this legislation, with the same flaw, without setting out clearly for LERA to mean *"term of imprisonment imposed"* in light of these circumstances was and is irresponsible and a missed opportunity to reduce prison sentences and to save almost one billion dollars.

More disturbing, perhaps, is that, the Federal Prison Policy Project (FPPP), LERA's public promoter, was aware of these challenges, but failed to act. This is evidenced in an article it published entitled "White vs. Scibana." *The Liaison , Volume. 1, Issue 2, at p. 11 (May-June 2004),* wherein, FPPP states: "[T]he courts will simply throw out the lawsuits and possibly establish some broad precedents." *Id. at p. 12.* Nonetheless, FPPP pushed to have the bill introduced. Additionally, FPPP solicits financial contributions claiming they are "Tax

Deductible," but FPPP is not an IRS 501 (c)(3). *Id. at p. 13 (Membership Application). URL: http://www.fppp.org/Portals/67f4c555-6a47-4393-82d8-702357dbb89b/FPPP-News.5.04.pdf*

FPPP continues to promote, among other things, that LERA will be "bringing our loved ones home," and "LERA will open up the possibility of our loved ones returning to us much faster than expected even a few months ago." *Id. at p. 1, 3*.

This is simply not true. As written, LERA will do no such thing. In the best of all worlds, if the bureau were to voluntarily implement LERA's so called "Designated Program[s]", and if and inmate were to meet the criteria of what is yet to be defined by the bureau as "Satisfactory Participation in a Designated Program" *LERA at Sec. 2(c)(2),* then and only then, at the sole discretion of the bureau and it's employees, *may* an inmate receive GCT days in an amount to be determined and established by the bureau, up to 60 additional days of each year served. *LERA at Sec. 2(a)(3)(A).* However, "Credit that has not been earned may not later be granted." *LERA at Sec. 2(c)(1).* This means an inmate who has already served ten years, for example, cannot receive the additional LERA credits for those past ten years.

"Designated Programs." *LERA at Sec. 2(c)(5).* This LERA provision is troubling and impracticable for a number of reasons, namely, but not limited to: no funding, no space, one or more years of 'wait list' for existing bureau programs and more important, *"[a]s the inmate population continues to grow, the cost of operating federal prisons is increasing. It's happened at a time when the priority had to be placed on defense and [national] security." "Union officials say the administration's budget recommendation for next year is $300 million short of what it needs. A six-week hiring freeze is to end [8-23-2004] , but the bureau has said budget problems may require job cuts and transfers next year that "could affect every staff member and position." URL: http://www.startribune.com/viewers/story.php?template=print_a&story=4939901*

Further considerations are 'institutional needs' i.e., INMATE WORK/PROGRAM ASSIGNMENT. The current bureau policy is *PS 5251.0-- WORK AND PERFORMANCE PAY PROGRAM, INMATE,* Its pertinent part reads as follows:

> 8.[INMATE WORK/PROGRAM ASSIGNMENT §545.23
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> a. Each sentenced inmate who is physically and mentally able is to be assigned to an institutional, industrial, or commissary work program. Exception shall be made to allow for inmate participation in an education, vocational, or drug abuse treatment program, on either a full or part-time basis, where this involvement is mandated by Bureau policy or statute (for example, the Literacy Program). Where such participation is not

required by either policy or statute, exception may be made to allow an inmate to participate in an education, vocational, or drug abuse treatment program rather than work full-time upon the request of the inmate and approval of the Warden or designee.]

The inmate's unit classification team ordinarily makes work and program assignments.

Id.

LERA makes no changes here, instead LERA leaves the whole matter of "Designated Program" up to the bureau to decide.

Appendix.

18 U.S.C. § 3624, Current Law:

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 229 - POSTSENTENCE ADMINISTRATION
SUBCHAPTER C - IMPRISONMENT

Sec. 3624. Release of a prisoner
-STATUTE-

(a) Date of Release. - A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit Toward Service of Sentence for Satisfactory Behavior.-

(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year (FOOTNOTE 1) other than a term of imprisonment for the duration of the prisoner's life, may receive

credit toward the service of the prisoner's sentence, beyond the time served, of up to *54 days* at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(FOOTNOTE 1) So in original. Probably should be followed by a comma.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) Pre-Release Custody. - The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions

that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) Allotment of Clothing, Funds, and Transportation. - Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with -

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) Supervision After Release. - A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(f) Mandatory Functional Literacy Requirement. -

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means -

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

18 U.S.C. § 3624.
