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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ASHOKKUMAR PATEL,

Petitioner,

v.

H. BARRON, et al.,

Respondents.

CASE NO. C23-937-KKE

ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS

I. INTRODUCTION AND SUMMARY OF DECISION

This matter comes before the Court on Petitioner Ashokkumar Patel’s petition for a writ of habeas corpus. Dkt. No. 1. After conducting de novo review of the petition and opposition thereto, along with all supporting documents, Judge Peterson’s Report and Recommendation (Dkt. No. 13 (hereinafter “R&R”)), the Respondents’ (hereinafter “the Government”) objections to the R&R, and Petitioner’s response to the objections, the Court approves and adopts the R&R, thereby granting Petitioner’s petition.

II. BACKGROUND

Petitioner filed a writ of habeas corpus under 28 U.S.C. § 2241 asserting that the United States Bureau of Prisons (“BOP”) miscalculated his sentence by failing to appropriately apply earned time credits (“ETCs”) toward his sentence under the First Step Act (“FSA”), 18 U.S.C.

1 § 3632(d). United States Magistrate Judge Michelle Peterson issued an R&R recommending that
2 Petitioner's petition be granted and that BOP should be directed to recalculate Petitioner's ETCs.
3 Dkt. No. 13. The Government objected to the R&R, and Petitioner responded to those objections.¹
4 Dkt. Nos. 14-15.

5 The underlying facts are not in dispute and are set forth in detail in the R&R, and repeated
6 here for the sake of clarity:

7 On September 15, 2020, Petitioner was sentenced in the District of
8 Massachusetts to a term of 40-months confinement following his guilty pleas to
9 charges of conspiracy to commit wire fraud, wire fraud, and money laundering. *See*
10 *United States v. Patel*, Case No. 4:18-cr-40027-TSH (D. Mass.), dkt. ## 73, 100,
11 113. Petitioner was directed to self-report by November 3, 2020. *See id.*, dkt. # 113
12 at 2. However, on October 16, 2020, Petitioner was arrested for failing to comply
with orders restricting his travel, and he was placed in custody at FDC SeaTac. (*See*
13 *Pet. at* ¶ 3.2; *Resp.*, Attach. B at 3-4.) On the same date, Petitioner was charged in
14 the District of Massachusetts with contempt based upon his failure to comply with
15 that court's orders restricting travel. *See United States v. Patel*, Case No. 4:20-cr-
16 40039-TSH (D. Mass.), dkt. ## 1, 5.

17 Petitioner was transferred out of FDC SeaTac on March 16, 2021, pursuant
18 to a federal writ. (*See Resp.*, Attach. A at 1.) Petitioner was then apparently returned
19 to the District of Massachusetts for proceedings related to the contempt charge. *See*
20 *Patel*, Case No. 4:20-cr-40039-TSH, dkt. ## 10-11. On December 14, 2022,
21 Petitioner entered a guilty plea to that charge and was sentenced to a term of six
22 months' confinement, to be served consecutively to the term of confinement
23 imposed in Case No. 4:18-cr-40027. *See id.*, dkt. # 55. Judgment was entered the
24 following day, December 15, 2022. *See id.*, dkt. # 58. Petitioner was thereafter
transferred back to FDC SeaTac to serve his sentence, arriving on April 20, 2023.
(*See Pet. at* ¶ 3.5.) As relevant here, the BOP is currently crediting Petitioner with
ETCs for the period beginning April 20, 2023, the date he arrived back at FDC
SeaTac. (*See Pet. at* ¶ 3.5; *Resp.*, Attach. A.) Petitioner asserts that the BOP is not
currently crediting him with ETCs for the period between December 15, 2022,
when he was sentenced in his most recent criminal proceeding², and April 20, 2023,

¹ The Court commends the Government's filing of objections to the R&R on an expedited schedule to facilitate prompt resolution of Petitioner's time-sensitive request for relief. *See* Dkt. No. 15 at 1.

² Petitioner references both December 14, 2022, and December 15, 2022, as the date on which he was sentenced and eligible to begin earning ETCs. (*See Pet. at* ¶¶ 3.4-3.5, 3.8, 4.3(b).) The docket of Petitioner's second District of Massachusetts criminal case makes clear that Petitioner was sentenced on December 14, 2022, but the order committing him to the custody of the BOP was not signed and entered until December 15, 2022. *See Patel*, Case No. 4:20-cr-40039-TSH, dkt. # 58.

1 when he arrived back at FDC SeaTac, because of a BOP policy that conflicts with
2 the FSA. (*See* Pet. at ¶¶ 3.6-3.7, 4.3(b)-4.4.)³ Petitioner claims that he is eligible to
3 receive ETCs for this period, and that if the BOP were to apply these ETCs, he
4 would be entitled to an additional 60 days of credit. (*Id.* at ¶¶ 3.8-3.9.) As of August
5 21, 2023, the BOP had calculated Petitioner’s projected release date as November
6 24, 2023. (*See* Reply, Ex. A.) Petitioner maintains that with additional credits he
7 will earn between now and his projected release date, and the additional 60 days he
8 claims should be credited, his release date would be September 9, 2023. (*Id.* at 2.)

9 Dkt. No. 13 at 2–3.

10 Judge Peterson explained the purpose of FSA time credits as follows:

11 Congress enacted the FSA on December 21, 2018. Pub. L. No. 115-391,
12 132 Stat. 5194. The FSA called for the implementation of a “risk and needs
13 assessment” system to evaluate federal inmates’ recidivism risk and included a
14 directive to establish evidence-based recidivism reduction programs. 18 U.S.C.
15 § 3632(a)-(b). The FSA also established various incentives for inmates to
16 participate in its anti-recidivism programming. 18 U.S.C § 3632(d). One such
17 incentive was the awarding of “time credits” to “be applied toward time in
18 prerelease custody or supervised release” upon eligible inmates’ successful
19 completion of anti-recidivism programming.⁴ 18 U.S.C. § 3632(d)(4)(C). Eligible
20 inmates receive ten days of FSA time credits for every thirty days of anti-recidivism
21 programming they successfully complete. 18 U.S.C. § 3632(d)(4)(A)(i). If the BOP
22 determines that an inmate is at a “minimum” or “low” risk of recidivating and the
23 inmate has not increased his risk of recidivism over two consecutive risk
24 assessments, then he earns an additional five days of time credits for every thirty
25 days of successfully completed programming. 18 U.S.C. § 3632(d)(4)(A)(ii).

26 The FSA prohibits inmates in certain circumstances from earning credits.
27 As relevant here, an inmate may not earn credits “during official detention prior to
28 the date the prisoner’s sentence commences under [18 U.S.C. §] 3585(a).” 18
29 U.S.C. § 3632(d)(4)(B)(ii). Section 3585(a) provides that “[a] sentence to a term of
30 imprisonment commences on the date the defendant is received in custody awaiting
31 transportation to, or arrives voluntarily to commence service of sentence at, the
32 official detention facility at which the sentence is to be served.” The BOP has
33 implemented regulations codifying its procedures regarding the earning and
34 application of time credits under the FSA. *See* 28 C.F.R. § 523.40(a). With respect
35 to the earning of FSA credits, BOP regulations provide that “[a]n eligible inmate
36 begins earning FSA Time Credits after the inmate’s term of imprisonment
37 commences (the date the inmate arrives or voluntarily surrenders at the designated
38 Bureau facility where the sentence will be served).” 28 C.F.R. § 523.42(a). The

39 ³ Petitioner’s petition contains two paragraphs identified as “4.3.” (*See* Pet. at 3-4.) For purposes of clarity, the Court
40 refers to those paragraphs as ¶ 4.3(a) and ¶ 4.3(b).

41 ⁴ Several classes of prisoners are precluded from earning time credits under the FSA, but Petitioner does not appear
42 to belong to any of them. *See* 18 U.S.C. § 3632(d)(4)(D).

1 regulations also provide that an inmate must be “successfully participating” in
2 designated programming in order to earn FSA credits, see 28 C.F.R. § 523.41(c)(1),
3 and that an inmate is not considered to be “successfully participating” if the inmate
4 is in “[t]emporary transfer to the custody of another Federal or non-Federal
5 government agency (e.g., on state or Federal writ, transfer to state custody for
6 service of sentence, etc.),” 28 C.F.R. § 523.41(c)(4)(iii).

7 Dkt. No. 13 at 6–7.

8 Judge Peterson went on to find that although it is undisputed that Petitioner did not exhaust
9 his administrative remedies before filing his petition, this requirement should be waived because
10 the exhaustion process was not effective and requiring further exhaustion would be futile. Dkt.
11 No. 13 at 5–6. Turning to the merits of the petition, Judge Peterson concluded that the FSA
12 unambiguously requires the BOP to recalculate Petitioner’s ETCs to include eligibility beginning
13 December 15, 2022, the date he was sentenced in the District of Massachusetts and committed to
14 the custody of the BOP. *Id.* at 6–10.

15 The Government objects to Judge Peterson’s recommendations on the exhaustion issue as
16 well as on the merits of the petition. Dkt. No. 14. The Court will address each objection in turn.

17 **III. DISCUSSION**

18 **A. Waiver of Exhaustion is Appropriate in this Case.**

19 BOP has created an administrative remedy program whereby prisoners can seek formal
20 review of a complaint that relates to “any aspect of [their] own confinement” (28 C.F.R.
21 § 542.10(a)), including BOP’s computation of their sentences. *See United States v. Wilson*, 503
22 U.S. 329, 335 (1992). As a general matter, “[f]ederal prisoners are required to exhaust their federal
23 administrative remedies prior to bringing a petition for a writ of habeas corpus in federal court.”
24 *Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). Exhaustion is not a jurisdictional
requirement in Section 2241 cases, however, and is therefore subject to waiver. *See Ward v.*
Chavez, 678 F.3d 1042, 1045 (9th Cir. 2012). Courts have discretion to waive the exhaustion

1 requirement if, *inter alia*, “pursuit of administrative remedies would be a futile gesture[.]” *Laing*
2 *v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (cleaned up).

3 In this case, as noted *supra*, it is undisputed that Petitioner did not exhaust his
4 administrative remedies in requesting recalculation of his ETCs, bringing the issue first to prison
5 staff informally, and then to the warden.⁵ *See* Dkt. No. 13 at 5. Judge Peterson waived the
6 exhaustion requirement, finding that requiring full exhaustion would be futile. *Id.* at 6. The
7 Government objects, contending that further administrative review would not be futile because it
8 would serve to clarify the regulatory basis for the warden’s decision. Dkt. No. 14 at 7–8.
9 Specifically, the Government argues that it is unclear if BOP relied upon 28 C.F.R. § 523.42(a) or
10 28 C.F.R. § 523.41(c)(4)(iii) to deny Petitioner’s request for ETC recalculation, and that this lack
11 of clarity infects the petition because “it is unclear whether [Petitioner’s] case even presents the
12 question whether Section 523.42(a) is consistent with 18 U.S.C. § 3585(a).” Dkt. No. 14 at 7.

13 The Court is not convinced. Petitioner’s request for administrative remedy explicitly
14 alleges that Section 523.42(a) conflicts with the plain language of the FSA (Dkt. No. 10-3 at 3),
15 and the warden’s denial tracks the language of Section 523.42(a) in its focus on Petitioner’s
16 location. *Id.* at 2 (stating that Petitioner does “not meet the eligibility requirements to earn Federal
17 Time Credits due to the fact that you were not at your designated facility in the Federal [BOP]”).
18 Although the Government posits that “BOP might have treated [Petitioner] as ineligible to earn
19 time credits” under Section 523.41(c)(4)(iii) (Dkt. 14 at 7), the warden’s denial does not support
20 this reading. *See* Dkt. No. 10-3 at 2. Section 523.41(c)(4)(iii) provides that inmates will “generally

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22 ⁵ While Petitioner completed the first two steps of BOP’s administrative process, in order to fully exhaust, Petitioner
23 was required to appeal the warden’s response to the regional director and then again to BOP’s general counsel. *See*
24 Dkt. No. 13 at 4. The Government argues that Petitioner’s appeal to the regional director was rejected due to his
failure to include the text of the warden’s decision. Dkt. No. 14 at 8. However, the record also suggests that
Petitioner emailed BOP repeatedly in advance of his appeal seeking to obtain a copy of the warden’s decision and
was not timely provided with one. Dkt. No. 12-2.

1 not be considered to be successfully participating in EBRR programs or productive activities” in
2 a variety of situations, including while they are in “[t]emporary transfer to the custody of another
3 Federal or non-Federal government agency (e.g., on state or Federal writ, transfer to state custody
4 for service of sentence, etc.).” However, as of December 15, 2022, Petitioner was committed to
5 the custody of BOP via his sentence on the contempt charge.⁶ Dkt. No. 13 at 10; *see United States*
6 *v. Patel*, Case No. 4:20-cr-40039-TSH (D. Mass.), Dkt. No. 58. The Government does not argue
7 otherwise. Nor does the Government argue that Petitioner was not in fact participating in
8 programming while awaiting transfer to FDC SeaTac. As such, the Court declines the
9 Government’s invitation to find that the warden may have had Section 523.41(c)(4)(iii) in mind
10 when denying Petitioner’s administrative remedy request. Accordingly, this Court agrees with
11 Judge Peterson’s conclusion that Petitioner’s administrative remedy request was denied pursuant
12 to Section 523.42(a). *See* Dkt. No. 13 at 5-6.

13 Under these circumstances, because BOP followed its own regulations in denying
14 Petitioner’s request, requiring Petitioner to file additional appeals up the chain of command at BOP
15 is unlikely to yield a different result, and the time required to further pursue administrative appeals
16 would likely moot Petitioner’s request for relief. As such, Petitioner’s failure to fully exhaust his
17 administrative remedies would be futile and the administrative appeals process is not efficacious
18 in this case. The Court thus finds that waiver of this requirement is appropriate. *See, e.g., Huihui*
19 *v. Derr*, Case No. 22-00541 JAO-RT, 2023 WL 4086073, at *3 (D. Haw. Jun. 20, 2023) (“The
20 Court concludes that the administrative remedies process is not efficacious in this case and further
21 pursuit would be a futile gesture because . . . the Court concludes there is an error in Respondent’s
22 understanding of when Petitioner can begin earning credits under [the FSA]”).

23 _____
24 ⁶ As the Government observes, Petitioner is not seeking credit for the time between March 16, 2021, and December
15, 2022, when he was apparently transferred out of FDC SeaTac pursuant to a federal writ. Dkt. No. 14 at 4.

1 **B. Petitioner Was Eligible to Earn Credits Upon Sentencing.**

2 Judge Peterson concluded that BOP miscalculated Petitioner's ETCs by applying Section
3 523.42(a) to exclude his time spent in custody after his December 15, 2022 sentencing, when
4 Petitioner was awaiting transportation to FDC SeaTac. Dkt. No. 13 at 10. The Government objects
5 to this conclusion, arguing that because the FSA merely provides that ETCs cannot be earned
6 before a sentence commences, it does not mandate when a prisoner becomes eligible to earn ETCs.
7 Dkt. No. 14 at 9–10. According to the Government, because the FSA is ambiguous as to precisely
8 when a prisoner becomes eligible to earn ETCs under the FSA, BOP properly decided that question
9 and “reasonably chose to use the date on which an inmate arrives at a BOP-designated facility as
10 the starting point for eligibility.” *Id.* BOP argues that this reasonable interpretation is entitled to
11 deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837
12 (1984). *See* Dkt. No. 14 at 9–11.

13 “Under the *Chevron* framework, a reviewing court first determines if Congress has directly
14 spoken to the precise question at issue, in such a way that the intent of Congress is clear.” *Mijahid*
15 *v. Daniels*, 413 F.3d 991, 997 (9th Cir. 2005) (cleaned up). “If the intent of Congress is clear, that
16 is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously
17 expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43.

18 As to the first step of the *Chevron* framework, and consistent with the R&R and the other
19 courts to have analyzed this issue, the Court finds that the FSA is unambiguous as to when a
20 prisoner can and cannot earn time credits. The FSA sets out a procedure by which a prisoner “who
21 successfully completes evidence-based recidivism reduction programming or productive
22 activities, *shall* earn time credits” according to a set schedule. 18 U.S.C. § 3632(d)(4)(A)
23 (emphasis added). Section 3632(d)(4)(B) provides that prisoners are ineligible to earn ETCs (1)
24 before the statute was enacted, and (2) during official detention before the prisoner's sentence

1 commences under § 3585(a). The FSA also unambiguously provides that “[a] term of
2 imprisonment commences on the date the prisoner is received in custody awaiting transportation
3 to, or arrives voluntarily to commence service of sentence at, the official detention facility at which
4 the sentence is to be served.” 18 U.S.C. § 3585(a).

5 By contrast, 28 C.F.R. § 523.42(a) adds an additional exclusion, namely, the time in
6 between the commencement of a prisoner’s sentence and when the prisoner ultimately arrives at
7 his BOP-designated facility where his sentence will be served. Because Section 523.42(a) sets a
8 timeline that conflicts with an unambiguous statute, it is not entitled to *Chevron* deference and the
9 Court must give effect to the statutory text. *See Huihui*, 2023 WL 4086073, at *5 (“In this case,
10 Petitioner was not eligible before her sentence commenced, but under 18 U.S.C. §
11 3632(d)(4)(B)(ii), her ineligibility ended the moment she was sentenced under 18 U.S.C. § 3585(a)
12 because FDC had already received her in custody”); *Yufenyuy v. Warden, FCI Berlin*, No. 22-
13 CV-443-AJ, 2023 WL 2398300, at *3 (D.N.H. Mar. 7, 2023) (“Construed together, those
14 provisions make it clear that prisoners “shall” earn time credits, at the statutory rate, for all
15 qualified programs in which they successfully participate, except for the programs in which they
16 participated while imprisoned either before the FSA was enacted, or in detention before the date
17 when their “sentence commence[d] under 3585(a).”); *Umejesi v. Warden, FCI Berlin*, No. 22-CV-
18 251-SE, 2023 WL 4101455 (D.N.H. Mar. 30, 2023) (same). The Court finds no reason to depart
19 from the persuasive authority Judge Peterson relied upon and the Government has cited no
20 authority to the contrary.

21 IV. CONCLUSION

22 For these reasons, the Court ORDERS as follows:

- 23 1) The Report and Recommendation is approved and adopted.
- 24 2) Petitioner’s petition for a writ of habeas corpus (Dkt. No. 1) is GRANTED.

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3) Respondents are ORDERED to recalculate Petitioner’s First Step Act time credits to include eligibility for credits beginning on December 15, 2022, and to release Petitioner on the date established by that recalculation.

The clerk is directed to send copies of this order to Petitioner and to Judge Peterson.

Dated this 28th day of September, 2023.



Kyemberly K. Evanson
United States District Judge