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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

██████████ ██████████

Petitioner,

For a judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

-against-

TINA M. STANFORD, Chairwoman of the New
York State Board of Parole

Respondent.

Index No. ██████████

Judge:

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION FOR
RELIEF PURSUANT TO ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW
AND RULES AND IN OPPOSITION TO RESPONDENT'S ANSWER**

Joshua Goldberg
Ariel Rudofsky
Attorneys for Petitioner
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Tel.: 212-336-2000

PRELIMINARY STATEMENT

Petitioner ██████ brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules to vacate the September 2020 decision of the New York State Board of Parole denying him release on parole. Mr. ██████ timely filed his Article 78 Petition on October 8, 2021. On November 5, 2021, Respondent filed a Notion of Motion and Memorandum of Law in Support of Respondent’s Answer, seeking to dismiss the Petition for failure to serve a copy of the Notice of Petition and Petition upon the Office of the Attorney General pursuant to CPLR § 7804(c). It is undisputed that Mr. ██████ properly and timely served Respondent Tina M. Stanford on October 12, 2021. Moreover, as of this filing, the Office of the Attorney General has likewise been served with the Notice of Petition, Petition, and all supporting papers. On November 8, 2021, counsel for Mr. ██████ asked the Office of the Attorney General if it would consent to accepting service and withdrawing its motion to dismiss. Without providing any explanation or stating how it has been or would be prejudiced, the Attorney General’s Office declined to withdraw its motion. Nonetheless, Mr. ██████ has cured any ostensible service defect—which was the result, in any case, of an attorney mistake not attributable in any way to Mr. ██████—and there is no prejudice whatsoever to any party. The Court should therefore deny Respondent’s motion to dismiss the Petition based solely on this purported technical error, and allow this action to proceed.

ARGUMENT

The Court should not dismiss Mr. ██████’s meritorious petition for a purported failure to serve the Office of the Attorney General, which has now been cured in any event, and for which Respondent has not and cannot show any prejudice.

As an initial matter, while Mr. ████████ acknowledges that his counsel did not serve the Office of the Attorney General until November 9, 2021, Mr. ████████ *did* properly and timely serve Respondent Tina M. Stanford on October 12, 2021. *See* Rudofsky Aff., Ex A. Accordingly, Respondent has had notice as to “what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought.” *Marmo v. Dep’t of Env’t Conservation*, 134 A.D.2d 260, 260 (2d Dep’t 1987). Any failure to serve the Attorney General before November 9, 2021 thus was not prejudicial. Indeed, “the requirement of service on the Attorney–General in proceedings of this nature is to insure a timely defense by the State as to claims against it.” *Grassia v. Tracy*, 232 A.D.2d 930, 931 (3d Dep’t 1996) (internal quotation marks and citation omitted). Here, Respondent Stanford was properly served, given ample notice of the claims contained in Mr. ████████’s Petition, and provided the opportunity to assert a “timely defense.”

Courts have found that where the respondent is timely served, a failure to serve the Attorney General does not require a petition to be dismissed. *See, e.g., Ali v. Goord*, 267 A.D.2d 520, 521 (3d Dep’t 1999) (“[W]hile there is some question as to whether the Attorney-General was timely served with the order to show cause, this factor is not dispositive given the concession of timely service upon respondent.”). This is particularly true because the “Attorney-General is not a party to this proceeding, but rather the prospective attorney for a party.” *Quogue Assocs. v. N.Y. State Dep’t of Env’t Conservation*, 112 A.D.2d 999, 999-1000 (2d Dep’t 1985); *see also Medina v. Perales*, 138 Misc. 2d 1010, 1012 (N.Y. Sup. Ct. 1988) (“[T]he Attorney General is not the state officer whose determination is being challenged. While he is required to be served, his appearance herein is as attorney for respondent [] whose determination is being challenged. So long as the Attorney General is served, CPLR 7804(c) is jurisdictionally

satisfied. The time for such service is not stated therein.”); *Grassia*, 232 A.D.2d at 931 (“It is true that there is no evidence in the record that the Attorney–General was actually served as required by CPLR 7804(c). However, the Attorney–General was not a party to the proceeding but only respondents’ counsel.”).¹ Accordingly, Mr. ██████’s Petition should not be dismissed merely for failure to timely serve the Attorney General.

Moreover, Mr. ██████ has now cured the aforementioned error in service. On November 9, 2021, Mr. ██████ served the Notice of Petition, Petition, and supporting papers on Tina M. Standard c/o Jonathan S. Reiner, Esq., Assistant Attorney General, at the Office of the Attorney General in Albany, New York. *See Rudofsky Aff., Ex. B.* Courts may properly refuse to dismiss a petition where the request is brought based on a minor procedural error, especially where such an error is cured and no prejudice results. *See, e.g., Troy v. Sobol*, 216 A.D.2d 661, 662 (3d Dep’t 1995) (“Although such failure [to file proof of service of the petition on the Attorney–General within 30 days] is error, it does not require dismissal of the petition”); *Chem-Trol Pollution Servs., Inc. v. Ingraham*, 42 A.D.2d 192, 193 (4th Dep’t 1973) (“We agree that service on the Attorney General is a jurisdictional requirement but we do not believe that the failure to complete service on him before the four-month period expired mandates granting respondent’s motion to dismiss the petition.”); *Duffy v. Schenck*, 73 Misc. 2d 72, 73 (N.Y. Sup. Ct.), *aff’d*, 42 A.D.2d 774 (1973) (“There has been no prejudice, and while this decision should not be taken as approving the failure to comply with the requirement for serving the Attorney General in accordance with the statutory provisions, in this instance, the motion to

¹ Indeed, as explained in Siegel’s *New York Practice*, “CPLR 7804(c), which governs the service of the initial papers in an Article 78 proceeding, adds the requirement that when the respondent is a state body or officer (as opposed to one at municipal level, for example), service must also be made on the attorney general through a prescribed procedure. *If service is timely made on the respondent but late on the attorney general, however, it has been held that all is preserved.* The reason is that the purpose of this provision is to assure a defense by the attorney general if the named respondent does not have separate counsel, not to make the attorney general the party.” Siegel, *N.Y. Prac.* § 566 (6th ed. June 2021) (emphasis added).

dismiss for that reason is denied.”); *Griswald v. Village of Penn Yan*, 244 A.D.2d 950, 950 (4th Dep’t 1997) (“In the absence of prejudice to respondent, which was served with the petition 18 days before the return date and had ample time to prepare an answer, we disregard the [service] defect as a mere irregularity and reach the merits of this dispute.”); *Grassia*, 232 A.D.2d at 931 (“Although apparently not properly served with the signed order to show cause, the Attorney–General did receive papers in the proceeding and participated from the beginning. Although the failure to serve was error, it did not require dismissal of the petition.”); *Marmo*, 134 A.D.2d at 260 (“Since the Attorney-General thereafter received the proper papers, service was complete.”); *see also Kubersky v. Cameron Indus., Inc.*, 173 A.D.3d 541, 542 (1st Dep’t 2019) (finding that “plaintiff’s failure to serve notice on the attorney general until one year after commencing the action against her former employers, but during the course of litigation, does not require dismissal of her action”). In light of the fact that the Attorney General has now been served with the relevant papers, Mr. ██████’s Petition should not be dismissed.

The cases cited by Respondent are inapposite as they involved situations where the petitioner failed to serve *both* the Attorney General *and* the Respondent—which is clearly not the case here—and/or where the petitioner failed to follow specific court directions as to service. *See, e.g., Brown v. Scully*, 135 A.D.2d 713, 713 (2d Dep’t 1987) (dismissing petition where petitioner failed to serve a notice of petition on *both* “the respondents and the New York State Attorney-General” because such “failure . . . to acquire personal service over *the respondents* is a fatal jurisdictional defect precluding further action by this court”) (emphasis added); *Rosenberg v. N.Y. State Bd. of Regents*, 2 A.D.3d 1003, 1003-04 (3d Dep’t 2003) (dismissing petition where petitioner “failed to personally serve *any respondents, including the Commissioner*”) (emphasis added); *Spodek v. N.Y. State Comm’r of Tax’n & Fin.*, 85 N.Y.2d 760, 762 (1995) (dismissing

petition where there was a “*total* failure of service,” as petitioner “failed completely to comply with the rules governing personal service upon the State respondents *or* the Attorney-General”) (emphasis added); *Gantt v. Lape*, 83 A.D.3d 1349, 1349 (3d Dep’t 2011) (dismissing petition where petitioner failed to “serve any papers on respondent,” in addition to the Attorney General, and failed to comply with the service requirements in the order to show cause); *McCorkle v. Beaver*, 16 A.D.3d 715, 715 (3d Dep’t 2005) (dismissing petition where petitioner failed to follow specific service instructions, which included service on the Attorney General, because “[i]t is well settled that an inmate’s *failure to comply with the directives set forth in the order to show cause* requires dismissal of the petition for lack of personal jurisdiction”) (emphasis added).² No such aggravating factors are present here. To the contrary, as discussed above, Mr. ██████ served Respondent Stanford in an appropriate and timely manner. And there is no claim that Mr. ██████ failed to follow any court orders or instructions.

Finally, the purported service defect has resulted in no prejudice. It is worth noting that Respondent has not claimed that it has been prejudiced in any way whatsoever by the failure to timely serve the Office of the Attorney General. Nor could the Attorney General’s Office demonstrate any such prejudice. At a minimum, it is clear that the Attorney General received Mr. ██████’s Petition because it filed a timely Notice of Motion and Memorandum of Law in Support of Respondent’s Answer in response. Nonetheless, when Mr. ██████’s counsel approached the Attorney General’s Office on November 8, 2021—seeking its consent to accept service and withdraw its motion—the Office refused to withdraw the motion without providing any reason why or explaining how it has been or would be prejudiced by not previously

² Respondent’s other cited cases are similarly irrelevant as they do not involve dismissal of an Article 78 petition for failure to serve the Attorney General’s Office. *See, e.g., Schacter v. Sobol*, 213 A.D.2d 551 (2d Dep’t 1995) (merely noting an instance where the Attorney General was served in connection with a legal action); *Clarkstown v. Howe*, 206 A.D.2d 377 (2d Dep’t 1994) (same); *Hanley v. N.Y. State Exec. Dep’t*, 182 A.D.2d 317 (3d Dep’t 1992) (same).

receiving service. This is not surprising since Respondent Stanford—the other party to the proceeding—was properly and timely served, such that the State could “insure a timely defense . . . as to claims against it.” *Grassia*, 232 A.D.2d at 931. This is not a case where a party lacked timely notice as to “what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, [or] the relief sought.” *Marmo*, 134 A.D.2d at 260. The only conceivable “prejudice” here is that Respondent must now respond to the Petition on the merits—just as it would in any case following proper service—which is certainly not sufficient to justify dismissal.³


In sum, a minor defect in service should not prevent Mr. [REDACTED] from litigating the merits of his Article 78 Petition. This is particularly so given that the defect has been cured, Respondent Stanford was timely served, and there is no resulting prejudice as to any party.

CONCLUSION

For the reasons discussed above, the Court should deny Respondent’s motion to dismiss the Petition, direct Respondent to file an Answer pursuant to a schedule set by the Court, and grant such additional relief as the Court deems just and proper.

Dated: November 10, 2021
New York, New York

By: _____


Joshua Goldberg
Ariel Rudofsky
Attorneys for Petitioner
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Tel.: 212-336-2000

³ In the event that the motion to dismiss is denied, Respondent has asked for 60 days to answer the Petition. Mr. [REDACTED] does not object to this extension.