August 2021

Art. 78 Response - FUSL000031 (2013-03-22)

(4)

STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

In the Matter of [redacted]
DIN [redacted]

Petitioner,

AFFIRMATION

Index No. [redacted]

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, BRIAN FISCHER, Commissioner of New York State Department of Corrections and Community Supervision, NEW YORK BOARD OF PAROLE, ANDREA W. EVANS, Chairwoman of the New York Board of Parole,

Respondents.

Brian J. O'Donnell, an attorney admitted to practice in the State of New York, affirms the following under penalty of perjury pursuant to CPLR 2106.

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for Respondents: State of New York Department of Corrections and Community Supervision; Brian Fischer, Commissioner, State of New York Department of Corrections and Community Supervision; State of New York Department of Corrections and Community Supervision, Board of Parole; and Andrea Evans, State of New York Department of Corrections and Community Supervision, Board of Parole.

2. I have read the foregoing motion. The same is true to my knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true. I make this affirmation in support of respondent's motion.

3. By this proceeding, petitioner challenges the respondent's denial of his application for release to parole supervision following an interview conducted on August 21, 2012. (Petition, ¶ 5 and 6).

4. Since that time, petitioner has again appeared before the Board, on November 14, 2012. (Exhibit A, Parole Board Release Decision Notice).

5. The latest interview renders moot petitioner's challenge to the August 21, 2012 interview.

6. An inmate's reappearance before the Board moots out any judicial appeal that may be pending with respect to the prior interview and the subsequent Article 78 proceeding. Matter of Bonez v. State, 100 AD3d 1235, 953 NYS2d 912 (3d Dept. 2012), *lv. denied*, ___ NY3d ___, ___ NYS2d ___, 2013 WL 599575 (2013); Matter of Ellison v Evans, 100 AD2d 1159, 953 NYS2d 729 (3d Dept 2012); Matter of Tafari v Evans, 92 AD3d 1060, 937 NYS2d 902 (3d Dept 2012); Matter of Ortiz v Alexander, 83 AD3d 1078, 921 NYS2d 863 (2d Dept 2011); Matter of Borcsok v New York State Board of Parole, 76 AD3d 1167, 907 NYS2d 729 (3d Dept 2010); Matter of Brown v New York State Board of Parole, 72 AD3d 1375, 898 NYS2d 536 (3d Dept 2010).

MOOTNESS

7. As a "fundamental principle" of jurisprudence, courts have the power to declare law only when determining the rights of persons in an actual controversy. Thus, they may not pass on academic, hypothetical or moot questions. This ban is founded on

the separation of powers doctrine. Hearst Corp. v Clyne, 50 NY2d 707, 713-14 (1980). *See generally* Mtr of Joyce v Mann, 190 AD2d 922 (3d Dept 1993) (injunctive relief against staff of one facility is moot after an inmate moves to another facility); Mtr of Collins v Rodriguez, 138 AD2d 809 (3d Dept 1988) (challenge to preliminary parole revocation hearing becomes moot upon completion of the final revocation hearing); Mtr of Cunningham v NYS Board of Parole, 190 AD2d 922 (3d Dept 1993) (new parole release hearing will moot challenges to previous parole release denial).

8. In certain circumstances, courts will address the merits of a proceeding that is moot. Three factors must exist, however, for a court to take this extraordinary actions:

> (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

In re Lucinda R., 85 AD3d 78, 84, 924 NYS2d 403, 408 (2d Dept 2011), *quoting* Mtr of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 (1980); Matter of Schermerhorn v Becker, 64 AD3d 843, 883 NYS2d 325 (3d Dept 2009); Mtr of the Herald Co. v O'Brien, 149 AD2d 781 (3d Dept 1989); Mtr of Cerniglia v Ambach, 145 AD2d 893 (3d Dept 1988), *lv denied,* 74 NY2d 603 (1983).

9. Petitioner erroneously alleges an exception to the Mootness doctrine applies.

10. Though it does not appear that an appellate court has ruled on the precise issue of the amendment to Executive Law § 259-c(4) yet, it has been raised in cases brought up on appeal. *See*, Matter of Amen v New York State Division of Parole, 100 AD3d 1230, 1231, 954 NYS2d 276, 277 (3d Dept 2012); Matter of Hamilton v New York State Division of Parole, 101 AD3d 1549, 955 NYS2d 899 (3d Dept 2012).

11. It has long been settled that the factors the Board is required to consider in determining whether to grant an inmate release to parole supervision are set forth within Executive Law § 259-i(2)(c)(A) (formerly § 259-i(2)(c)(A) and § 259-i(1)(a)). Matter of Graziano v. Evans, 90 AD3d 1367, 935 NYS2d 382 (3d Dept 2011), *lv denied*, 18 NY3d 810, 944 NYS2d 481 (2012); Matter of Barnes v New York State Division of Parole, 53 AD3d 1012, 862 NYS2d 639 (3d Dept 2008); Matter of Gaetan v Travis, 17 AD3d 893, 792 NYS2d 880 (3d Dept 2005); Matter of Zhang v Travis, 10 AD3d 828, 782 NYS2d 156 (3d Dept 2004) ("the factors the Board must consider in making discretionary parole release determinations are set forth in Executive Law § 259–i(2)(c)."); See, Matter of Goldberg v New York State Board of Parole, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 440625 (2d Dept 2013).

12. Executive Law § 259-c(4) for years provided that the Board of Parole "shall": "establish written guidelines for its use in making parole decisions as required by law, including the fixing of minimum periods of imprisonment or ranges thereof for different categories of offenders". The "guidelines" referenced in Executive Law § 259-c(4) were "intended only as a guide". Matter of Rodriguez v Evans, 82 AD3d 1397, 918 NYS2d 388 (3d Dept 2011).

13. In March 2011 Executive Law § 259-i(2)(c)(A) was amended to consolidate therein the requisite factors for consideration which had formerly been dispersed between § 259-i(2)(c)(A) and § 259-i(1)(a).

14. Executive Law § 259-c(4) was amended to eliminate reference to "guidelines" and to introduce that the Board "shall" "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the

likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision".

15. "Risk and needs principles" is not defined, and Executive Law § 259-c(4) dictates neither how new "written procedures" are to be established, nor in what manner "risk and needs principles" are to be incorporated within them.

16. The specific factors that the Board is required to consider, as well as the governing standards it must apply after weighing those factors, remain exactly the same. Executive Law § 259-i(2)(c)(A); Correction Law § 805.

17. The October 5, 2011 Memorandum from Chairwoman Andrea Evans to the Board of Parole serves as the procedures referenced in the amended Executive Law § 259-c(4) and in effect at the time of petitioner's parole interviews in August 2012 and November 2012. Those procedures in large part simply direct the Board to the mandate of Executive Law § 259-i(2)(c)(A) that the factors set forth therein be considered in every case. Executive Law § 259-i(2)(c)(A) and Correction Law § 805, continue to require a consideration of the inmate's rehabilitation and an assessment of the probability, in the Board's opinion, that the person would violate the law if released. (Exhibit B).

18. Executive Law § 259-c(4) and the required procedures allow for the Board to fulfill its obligations - as was done here - by considering the factors required per Executive Law § 259-i(2)(c)(A) and thereby inquiring into the steps, if any, the inmate has taken towards rehabilitation. Melvin Gass v. The New York State Board of Parole, Index No. 12-3199 (Sup. Ct. Ulster Co., Feb. 8, 2013) (Connolly, J.) (Exhibit C); Gilberto Ortiz v. Andrea Evans, Index No. 3933-12 (Sup. Ct. Albany Co., Dec. 3, 2012) (Platkin, J.) (Exhibit D); Carlos Rodriguez v. New York State Division of Parole, et al., Index No. 3932-12 (Sup. Ct.

Albany Co., Nov. 29. 2012) (Platkin, J.) (Exhibit E); Michael Melendez v. Andrea Evans, Index No. 1973-12 (Sup. Ct. Sullivan Co. Sept. 27, 2012) (LaBuda, J.) (Exhibit F).

19. The Board must always consider the inmate's crime and criminal history, and it continues to be the case that "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties" while incarcerated. Executive Law § 259-i(2)(c)(A).

20. While at one point petitioner assails the October 2011 procedures as a "disavowal of [Executive Law § 259-c(4)'s] import" for the fact that they direct the Board to Executive Law § 259-i(2)(c)(A) (Petition, p.17-18 ¶67), petitioner does not attempt to provide any particular, different "import". Significantly, the Legislature could have changed the standards or the Executive Law § 259-i(2)(c)(A) factors the Board is required to consider, but it did not.

21. Upon information and belief, the fact that the governing factors and standards remain the same per Executive Law § 259-i(2)(c)(A) and Correction Law § 805 also answers petitioner's complaint that his parole denial was somehow infirm for the lack of a "TAP".

22. The October 2011 procedures suggest the Board need only consider such a plan "when staff have prepared" one, and the plain language of Correction Law § 71-a ("Transitional accountability plan"), which went into effect on or about October 1, 2011, makes clear that the intention was to develop such a plan "Upon admission of an inmate committed to the custody of the department under an indeterminate or determinate sentence of imprisonment".

23. Even if one were to construe from this section some right to an undefined "TAP" flowing to inmates, that right would not flow to petitioner inasmuch as he was admitted to state corrections on March 1, 2011, and could have had no expectation of a "TAP" relevant to his case.

24. Upon information and belief, petitioner does not present a "substantial" issue excepting his petition from dismissal for mootness.

25. Upon information and belief, nothing, including Executive Law § 259-c(4) and the October 2011 procedures, obligated the Board to consider a "COMPAS" risk and needs assessment. Nevertheless the record reveals that this report was a part of the record in the Board's consideration of petitioner's case, and the October 2011 procedures specifically make reference to the Board having received training on the report. (*See*, Exhibit G).

26. Upon information and belief, the COMPAS is also a largely releasable document that petitioner and his counsel have access to.

27. Petitioner's mere conclusory allegation that "without Procedures complying with due process, the Board... irrationally ignored its own risk and needs assessment instrument" is without merit.

28. The facts of this proceeding do not satisfy the three-part test set forth in Hearst.

29. Accordingly, due to the fact that this proceeding is moot, this proceeding must be dismissed.

WHEREFORE, I respectfully ask this Court to dismiss the petition and deny the relief requested by the petitioner and award costs. In the event that this Court denies our request for relief, we request 30 days to answer.

Dated: [redacted]
March 22, 2013

Brain J. O'Donnell