Art. 78 Petitioner's Reply - FUSL000018 (2019-10-22)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted]
Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,
Respondents

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

PETITIONER'S REPLY

Index No. [redacted]

Judge Christi J. Acker

Petitioner, Mr. [redacted] replies to Respondents' Verified Answer and Return as follows:

I. Respondents Improperly Equate the Arguments Made in the Present Petition to Those Previously Addressed in a Prior Court Decision

1. Respondents' assertion that the issue of "police-based community opposition" that is raised in this petition was addressed in a prior court decision is inaccurate and misleading. Answer ¶ 5 (citing [redacted] *v. New York State Division of Parole*, Index No. [redacted] (Albany Cnty. 2016)). First, the 2016 decision determined that even if there were inappropriate content contained in the "community opposition"[1] the denial decision did not indicate that the Board was influenced by, placed weight upon, or relied upon such. *Id.* at 7. Here, the Board's decision not only

[1] In the 2016 case, the Board did not provide any of the opposition letters to the court. Id. at 7.

considered, but also *heavily relied upon*, improper community opposition that espoused penal philosophy in violation of applicable law. *See* Pet. at 3-9. Therefore, Respondents' claim that the issue was already raised and dismissed by another court is incorrect. Answer ¶ 5.

2. In addition, Respondent incorrectly implies that the previous decision, issued by the Supreme Court in Albany County, has authority over this Court. First, a 2016 decision from Albany County is not binding authority on this Court. In addition, this is all the more so since this case challenges the Board's 2018 denial, not the 2015 denial under review in the 2016 Albany County decision, and does so based on a different record. Pet. at 2.

II. Respondents Fail To Address the Board's Consideration and Reliance upon Inappropriate "Community Opposition" in Violation of Law

3. The contents of the "community opposition" considered and relied on by the Board contained inappropriate penal philosophy; Respondents' Answer does not argue otherwise. Instead, Respondents inaccurately claim that Mr. [redacted] is urging an interpretation of the statute that would violate the First Amendment to the Constitution and threaten the Separation of Powers. Answer ¶ 23-24. A finding by this Court that the Board considered and relied upon inappropriate penal philosophy does not interfere with anyone's First Amendment rights. The right to free speech does not include the right to insist the audience will listen, consider, or rely upon such speech. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications . . . ."). Here, the "speech" considered and relied upon by the Board conveyed solely penal philosophy, which the Court of Appeals has held is "outside the scope of the applicable statute." *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994). Respondents entirely failed to address this.

III. Respondents Do Not Address the Board's Failure to State a Valid Exception for Withholding or Redacting Portions of Petitioner's Parole File

4. Respondents fail to justify why they withheld certain portions of Mr. [redacted]'s parole file from him. Pet. at 2-29; Answer ¶ 28-29. Respondents argue that "[a]n inmate has no constitutional right to the information in his parole file," but Mr. [redacted] never argued such. Answer ¶ 28. Mr. [redacted]'s right to disclosure of portions of the parole file is based on the governing regulations, which state that a parole applicant "*shall* be granted access" to information considered by the Board. *See* 9 NYCRR § 8000.5(a)(2)(i) (emphasis added). The mandatory word "shall" creates a right for the Petitioner to access information in his parole file.

5. Respondents argue that the Board should not release confidential information; Petitioner does not disagree. Answer ¶ 28-29. Respondents, however, fail to address whether the portions withheld are actually confidential. Pet. at 24-25. The law creates only three exceptions for the Board to withhold information: if its release would lead to a "serious disruption of his institutional program," disclosure of "information obtained upon a premise of confidentiality," or "physical harm." *See* 9 NYCRR § 8000.5(a)(2)(i); *see also* Pet. at 24-25. The Board failed to conduct an individualized analysis of whether withholding or redacting certain documents was justified under the statutory exceptions. Pet. at 24-29. For example, Respondents do not address binding authority that required disclosure of the "opposition" material to Mr. [redacted] before his parole interview. Pet. at 26; Answer ¶ 28-29.

IV. Request for Disclosure of Material Submitted Ex Parte by Respondents

6. Mr. [redacted] requests disclosure of Respondents' Exhibit 3, portions of which were submitted *ex parte* to this Court. In the alternative, Mr. [redacted] requests disclosure of these documents to his counsel under a protective order prohibiting further disclosure pending an application by counsel for disclosure and a requisite order by this Court.

CONCLUSION

For these reasons and those stated in the Petition, Mr. [redacted] respectfully requests that this Court grant the Petition and order Respondents to hold a *de novo* parole review and to give any other relief this Court may deem appropriate.

Dated: New York, New York
October 22, 2019

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