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### Decision in Art. 78 proceeding - Grune, Jeffrey (2006-02-02)

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

Albany County Clerk  
Document Number 9653014  
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In the Matter of the Application of

Jeffrey Grune 03A4374

Petitioner,

DECISION AND JUDGMENT

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

-against-

ROBERT DENNISON, CHAIRMAN NEW YORK STATE  
DIVISION OF PAROLE,

Respondent,

(Supreme Court, Albany County, Special Term)

APPEARANCES:

JEFFREY GRUNE  
Inmate No. 03A-4374  
Petitioner, Self-represented  
Fishkill Correctional Facility  
P.O. Box 1245  
Beacon, New York 12508

ELIOT SPITZER, ESQ.  
Attorney General of the State of New York  
(Kate H. Nepveu, Esq.,  
Assistant Attorney General, of Counsel)  
Attorneys for Respondent  
The Capitol  
Albany, New York 12224

Leslie E. Stehn, J.:

Petitioner, an inmate at Fishkill Correctional Facility, previously commenced this instant CPLR Article 78 proceeding for the following relief: to compel respondent to produce transcripts from an October 2004 merit time interview and a January 2005 parole board hearing; to compel respondent to produce records and/or decide petitioner's appeal regarding denial of his Freedom

of Information Law (FOIL) request (to access portions of his Inmate Status Report and for the worksheets used to prepare the incarceration guidelines); and a declaration that respondent's policy regarding the number of commissioners reviewing parole applications is violative of equal protection laws. The Court, in a Decision and Judgment dated October 20, 2005, dismissed the petition with the exception of the portion of the petition seeking an Order compelling the production of petitioner's Inmate Status Report. The Court reserved decision on that issue pending submission of the entire report for *in camera* review. Petitioner now brings a motion seeking leave to reargue and renew the Court's Decision and Judgment.

Respondent has provided the Court with petitioner's Inmate Status Report for the *in camera* review. Respondent also submitted correspondence concerning the potential disclosure of the Report. Respondent solely argues that the last sentence of Page 9 of the report should be withheld as evaluative material under Public Officers Law § 87(2)(g) and 9 NYCRR 8000.5(c)(2)(i)(a). Additionally, respondent has served an affidavit in opposition to petitioner's motion. Respondent argues therein that petitioner did not identify any new facts or new law which would justify a change in the Court's prior determination.

Inmate Status Report

In addition to FOIL, the disclosure of the Inmate Status Report and other parole records is governed by 9 NYCRR § 8000.5, which forbids disclosure of any portion of the parole records which contains: "diagnostic opinions which, if known to the inmate/releasee, could lead to a serious disruption of his institution program or supervision." (9 NYCRR 8000.5(c)(2)(i)(a)). The Court has reviewed the entire inmate status report and agrees with respondent that the last sentence of paragraph 9 should not be disclosed because it constitutes a diagnostic opinion

which, if released to the inmate, could lead to a serious disruption of his institution program or supervision. The remainder of the twelve page report must be disclosed, as the Court finds, and respondent has articulated, no exceptions under FOIL or 9 NYCRR 8000.5 which forbid the report's disclosure.

Motion to Reargue/Renew

Pursuant to CPLR 2221, a motion for leave to renew must be based on new facts, not offered in the previous application, that would change the prior determination. Alternatively, the motion proponent must demonstrate that there has been a change in the law that would change the determination. Petitioner has failed to set forth any change in the law which would warrant a change in the Court's prior determination.

Arguably, petitioner has set forth a new fact which the Court did not have before it on its initial determination. Petitioner became aware, via correspondence from counsel for respondent, that the worksheets used for incarceration guidelines are not retained after the Parole Board renders its decision. Previously, petitioner and the Court were under the impression that the worksheets were discarded after entry into the computer. Nevertheless, this new fact does not address the core issue underlying the Court's prior determination on disclosure of the worksheets. In the prior determination, the Court held "that the worksheet was a non-final pre-determination document utilized to establish petitioner's guideline range and that it falls within the exception set forth in Public Officers Law § 87(2)(g) and, therefore is not subject to FOIL." The fact that the worksheets are discarded after the Board renders its decision, rather than after the information is entered into the computer does not change the Court's classification of the documents as exempt under FOIL. Since this was petitioner's sole argument in his motion to renew, the motion for renewal must be denied.

Motions to reargue must be based on matters of fact or law which were overlooked or misapprehended by the Court in determining the prior motion (CPLR 2221[d][2]). Petitioner's first issue on reargument challenges the Court's determination on respondent's lengthy delay in responding to petitioner's transcript requests. In the prior determination, the Court held that, since petitioner had received the relief requested in the petition (receipt of the transcripts), that portion of the petition was moot. Petitioner contends that, because this issue is a recurring problem, the matter falls squarely within a recognized exception to the mootness doctrine.

The Court previously considered and rejected this argument. Petitioner has not demonstrated the manner in which the Court overlooked or misapplied the relevant law or facts. Importantly, petitioner cites no case law or statute to support his position.

Petitioner's next point on reargument addresses the release of his inmate status report. As the Court is now directing the release of the report, this portion of the motion for reargument is moot. The Court has reviewed petitioner's remaining issues on reargument and finds that they fail to demonstrate how this Court overlooked or misapprehended any relevant issues of fact or law. As such, the motion to reargue must be denied its entirety.

Finally, pursuant to CPLR 8101, "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances". Upon review of all of the facts and circumstances in this proceeding, the Court finds that an award of costs to either party would not be equitable as neither party substantially prevailed in the proceeding.

Accordingly, it is

extent that petitioner's Inmate Status Report, with the exception of the last sentence of page 9, which is to be redacted, shall be disclosed to him within thirty (30) days of the date of this Decision and Judgment; and it is further

**ORDERED**, that petitioner's motion to reargue/renew is hereby denied in its entirety; and it is further


**ORDERED**, that petitioner's and respondent's requests for costs are hereby denied.

This shall constitute the Decision and Judgment of the Court. All papers including the original of this Decision and Judgment are returned to the attorneys for respondent, who are directed to enter this Decision and Judgment without notice and to serve petitioner with a copy of this Decision and Judgment, with notice of entry.

**SO ADJUDGED!**

ENTER.

Dated: February 2, 2006  
Albany, New York

  
Leslie E. Stein, J.S.C.

Papers Considered:

1. Order to Show Cause dated April 8, 2005;
2. Petition dated March 18, 2005, together with annexed exhibits;
3. Answer dated June 23, 2005;
4. Affirmation of Megan M. Brown, Esq., dated June 23, 2005, together with all annexed exhibits;
5. Petitioner's Reply Affidavit, sworn to on June 29, 2005, together with annexed exhibits.
6. Notice of Motion to Reargue/Renew dated October 31, 2005;
7. Affidavit of Jeffrey Grune, sworn to on October 31, 2005, together with annexed exhibits;
8. Inmate Status Report and Correspondence from Kate H. Nepveu, Assistant Attorney General, dated November 16, 2005;
9. Affidavit in Opposition of Kate H. Nepveu, sworn to on November 23, 2005;
10. Correspondence from Jeffrey Grune dated November 22, 2005.