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STATE OF NEW YORK
SUPREME COURT COUNTY OF ST. LAWRENCE

X

In the Matter of the Application of
SHIH-SIANG SHAWN LIAO, #10-R-0674,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2013-0603.33
INDEX # 141882
ORI # NY044015J

-against-

TINA M. STANFORD, Chairwoman
NYS Board of Parole,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Shih-Siang Shawn Liao, verified on August 16, 2013 and filed in the St. Lawrence County Clerk's office on August 20, 2013. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the November 2012 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on August 26, 2013 and has received and reviewed respondent's Answer, including Confidential Exhibits B, C, and D, verified on October 4, 2013. The Court has also received and reviewed petitioner's Reply thereto, sworn to on October 18, 2013 and filed in the St. Lawrence County Clerk's office.

On March 10, 2010 petitioner was sentenced in Supreme Court, Queens County, following a plea, to and indeterminate sentence of 3 to 9 years upon his conviction of the crime of Grand Larceny 2°. After being denied merit parole release petitioner made his initial regular appearance before a Parole Board on November 27, 2012. Following that appearance a decision was rendered denying him discretionary release and directing he be held for an additional 24 months. The parole denial determination reads as follows:

"DESPITE THE EARNED ELIGIBILITY CERTIFICATE, AFTER A REVIEW OF THE RECORD, INTERVIEW AND DELIBERATION, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW. PAROLE IS DENIED.

REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, TOGETHER WITH YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION, YOUR RISK AND NEEDS ASSESSMENT AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS AND ANY LETTERS OF REASONABLE ASSURANCE ARE ALSO NOTED. MORE COMPELLING, HOWEVER, ARE THE FOLLOWING:

THE DELIBERATE AND CAREFULLY CALCULATED ACTIONS REGARDING YOUR INSTANT OFFENSE ARE OF SERIOUS CONCERN TO THIS PANEL. YOUR ACTIONS DISPLAY A CONTINUATION OF A CRIMINAL BEHAVIOR OVER A PERIOD OF TIME SO AS TO NOT ONLY FALSIFY DOCUMENTS IN ORDER TO ILLEGALLY OBTAIN OVER $300,000.00 BY MORTGAGING A PROPERTY THAT YOU HAD NO RIGHT BUT ALSO IN ANY EFFORTS TO CONCEAL YOUR CRIME. YOUR POSITIVE PROGRAMMING AND PAROL [sic] PACKET PROVIDED TO THE BOARD FOR CONSIDERATION ARE NOTED.

HOWEVER, BASED ON ALL REQUIRED FACTORS IN THE FILE CONSIDERED, DISCRETIONARY RELESE [sic] AT THIS TIME IS NOT APPROPRIATE."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on April 18, 2013. Although the Appeals Unit failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about September 13, 2013, after this proceeding had been commenced.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C, subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (I) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470, *Vasquez v. Dennison*, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison*, 30 AD3d 521, *Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

In 2011 Executive Law 259-c(4) was amended to require that the Board of Parole " . . . shall . . . establish written procedures for its use in making parole decisions as

required by law. Such written procedures shall incorporate risk and needs principals 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 parol in determining which inmates maybe released to parole supervision . . ." Petitioner's sole claim[1] here is that "[b]ecause no written procedures mandated by the amended version of Executive Law 259-c(4) were established, much less implemented and considered in the context of determining whether or not petitioner should be released to parole supervision, therefore the November 27, 2012 decision of the Parole Board was not rendered in accordance with the law and should be overturned." (Petition, paragraph 26).

As an initial matter, Respondent asserts that the failure of Petitioner to have included this claim in his administrative appeal constituted a failure to exhaust his administrative remedies and therefore requires that the Court deny his petition. Petitioner Liao, in his Reply, responds that the long-standing, clearly stated position of the Board would render such administrative appeal futile.[2]

CPLR § 7801 provides, in relevant part, that an article 78 proceeding ". . . shall not be used to challenge a determination . . . which . . . can be adequately reviewed by appeal to . . . some other body or officer . . ." It is a basic tenet of administrative law that one who objects to the actions of an administrative agency must exhaust available administrative appeals prior to seeking judicial relief. *See Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52. The doctrine of exhaustion of administrative remedies is based

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[1] Any claim raised for the first time in Petitioner's Reply is not properly before the Court for its present determination.

[2] *Pro se* Petitioner's argument in this respect is raised adequately, if not artfully; specifically, he cites pertinent language from the unpublished July 10, 2013 Decision and Order in *Matter of Zarro v. NYSDOCS et al.*, denying respondents' motion to dismiss for failure to exhaust on the basis of the futility of such exhaustion under circumstances virtually identical to those here.

upon the principle that the "... reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the ... [administrative agency] of an opportunity to consider the matter, make its ruling, and state the reason for its action." *Young Men's Christian Association v. Rochester Pure Waters District*, 37 NY2d 371 at 375, quoting *Unemployment Comm. v. Aragon*, 329 US 143, 155. Thus, issues not raised on administrative appeal are ordinarily not reviewable within the context of a CPLR Article 78 proceeding. *See Scott v. Goord*, 272 AD2d 704, *Battiste v. Goord*, 255 AD2d 941 and *Malik v. Coughlin*, 133 Misc.2d 245.

Notwithstanding the foregoing, there is no requirement to exhaust administrative remedies when resort to such remedies would be futile. *See Lehigh Portland Cement Company v. New York State Department of Environmental Conservation*, 87 NY2d 136. In the *Lehigh Portland Cement* case, longstanding, clearly articulated DEC policy ran counter to the position taken by the plaintiff and that fact had been unambiguously communicated to the plaintiff. Under such circumstances it was determined that it would be futile for the plaintiff to be required to first challenge that policy determination at the administrative level. According to the Court of Appeals, the *Lehigh Portland Cement* case did ". . . not involve a new, unarticulated or unsettled policy issue within the administrative agency, a vague or unclear articulation of agency policy, a case-specific determination on unique facts, decisions issued by low-level agency employees, or any other circumstance which calls for a hearing so that a clearer formulation of and the rationales for agency policy may be fully aired. The plaintiff here could not hope to obtain a clearer definition or resolution of issues than already provided by the DEC." *Id.* at 143.

In the instant context, the Court notes the growing number of petitions presented wherein is asserted some variation of the argument presented by Petitioner here: that the Board has failed to produce written procedures as required by the 2011 statutory

amendment, and that such failure requires the granting of relief to those petitioners. In every instance, notwithstanding administrative appeal, the Board maintains a coherent and consistent response (as it does here), that the statute does not require formal rule-making *per se*, and that the memorandum of Andrea Evans dated October 5, 2011 satisfies the statutory requirement. It is abundantly clear that the agency has developed a clear and relatively long-standing policy, with respect to which the prospect of relief for Petitioner through administrative appeal would be clearly futile. It is appropriate under these circumstances that the Court proceed to the merits of Petitioner's argument.

As noted, the issue raised by Petitioner in the instant proceeding is not new to the Courts, although there is not as yet appellate authority on the subject. The leading cases which have addressed the issue head-on, with diametrically opposite results, are *Partee v. Evans*, 40 Misc 3d 896, and *Morris v. New York State Department of Corrections and Community Supervision*, 40 Misc 3d 226. *Morris* holds that the failure to establish written procedures, through the processes of rule making including filing with the Secretary of State, constitutes "[d]isregard of a legislative mandate through an administrative agency's inaction," and is thus "arbitrary and capricious and contrary to law." (*Morris* at 232) On this issue (among others), the petitioner in *Morris* was granted the relief of a prompt new hearing[3].

On the other hand, the petition in *Partee* was dismissed after thorough analysis of the issue and of the *Morris* rationale. The *Partee* court relies upon *Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854, for the proposition that where "standards encompass case-specific mitigating factors and vest the decisionmakers with significant

[3]It is unclear how respondent in *Morris* could comply with the directives of the court in the time allotted, given the necessary delays implicit in the rule-making process.

discretion with which to independently exercise their professional judgment, the standards constitute not rules but guidelines." *Id.* at 868-869 (citations omitted). Justice McGrath in *Partee* examines "the underlying regulatory scheme here, which still requires case by case analysis and is dependent on the Board's 'independent exercise of their professional judgment.'" *Partee v. Evans*, 40 Misc.3d 896, 907-908, quoting *New York City Transit Auth. v. New York State Dept. of Labor*, 88 N.Y. 2d 225, 230. On this analysis and the framework of both *Transit Authority* and *Medical Society*, Justice McGrath finds that inasmuch as the new legislation at issue does not divest the Parole Board of its historically recognized discretionary role, the rule-making provisions of the State Administrative Procedures Act are not applicable here. Thus "the failure to file written procedures with the Secretary of State does not render the parole decision in violation of lawful procedure and this court declines to follow the rationale set forth in *Morris*." *Partee* at 908. This Court finds the rationale of *Partee* compelling, and for the reasons fully set forth therein rejects Petitioner's claim here.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

DATED: December 19, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge

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