September 2021

Decision in Art. 78 proceeding - Liao, Shih-Siang Shawn (2013-12-31)

Matter of Liao v Evans
2013 NY Slip Op 33552(U)
December 31, 2013
Sup Ct, St. Lawrence County
Docket Number: 140947
Judge: S. Peter Feldstein

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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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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

-against-

DECISION AND ORDER
RJI #44-1-2013-0206.12
INDEX #140947
ORI # NY044015J

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole,
Respondent.

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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 March 8, 2013 and filed in the St. Lawrence County Clerk's office on March 21, 2013. Petitioner, who is an inmate at the Riverview Correctional Facility, challenged the June 2012 determination denying him discretionary merit parole release. An Order to Show Cause was issued on March 26, 2013. The Court received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Deanna R. Nelson, Esq., Assistant Attorney General in Charge, dated May 10, 2013 and including Confidential Exhibits B, D, E, and F. In addition, the Court received and reviewed petitioner's Affidavit in Opposition to Motion to Dismiss, sworn to on May 24, 2013 and filed in the St. Lawrence County Clerk's office on May 30, 2013. Annexed as Exhibit A to petitioner's Affidavit in Opposition to Motion to Dismiss was a proposed Amended Verified Petition, which was purported to include " . . . a newly discovered issue with supporting papers pertaining to another erroneous information about a 'supposed' court-ordered restitution in the case, which was used by the Parole Board at the merit-parole hearing . . ." The Court also received and reviewed

Respondent's Reply, dated June 6, 2013 as well as petitioner's July 1, 2013 letter request for leave to submit a sur-reply.

On March 1, 2010 petitioner was sentenced in Supreme Court, Queens County, to an indeterminate sentence of 3 to 9 years upon his conviction of the crime of Grand Larceny 2°. He was received into DOCCS custody on March 9, 2010 and DOCCS officials calculated his merit parole eligibility and initial regular parole eligibility dates as June 7, 2012 and December 10, 2012, respectively.

After appearing before a Parole Board for merit release consideration on June 26, 2012, a determination was issued denying petitioner merit release and directing that he be held to his initial regular parole eligibility date. The merit parole denial determination read, in relevant part, as follows:

> "DESPITE RECEIPT OF MERIT TIME AND AN EARNED ELIGIBILITY CERTIFICATE, AFTER A CAREFUL REVIEW OF YOUR RECORD, A PERSONAL INTERVIEW AND DELIBERATION, PAROLE IS DENIED. YOUR INSTITUTIONAL RECORD AND RELEASE PANS [sic] ARE NOTED. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS AND YOUR NEEDS FOR SUCCESSFUL REINTEGRATION INTO THE COMMUNITY. THIS PANEL REMAINS CONCERNED HOWEVER, ABOUT YOUR HISTORY OF UNLAWFUL CONDUCT WHICH, WHEN CONSIDERED WITH THE REQUIRED AND RELEVANT FACTORS, LEADS TO THE CONCLUSION THAT IF RELEASED AT THIS TIME THERE IS REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW AND YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY."

Petitioner's notice of administrative appeal from the merit parole denial determination was received by the DOCCS Parole Appeals Unit on July 5, 2012 and the document perfecting petitioner's administrative appeal (Appellant's Brief) was received by the Appeals Unit on October 31, 2012.

On November 27, 2012, while his administrative appeal from the merit parole denial determination was pending, petitioner appeared before a Parole Board for initial regular parole consideration. Following that hearing a determination was issued denying petitioner parole release and directing that he be held for an additional 24 months. The November 2012 parole denial determination read 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.
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> 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:
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> 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 PROGRAMING AND PAROL [SIC] PACKET PROVIDED TO THE BOARD FOR CONSIDERATION ARE NOTED.
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> HOWEVER, BASED ON ALL REQUIRED FACTORS IN THE FILE CONSIDERED, DISCRETIONARY RELESE [SIC] AT THIS TIME IS NOT APPROPRIATE."

Petitioner's notice of administrative appeal from the November 2012 regular parole denial determination was received by the DOCCS Parole Appeals Unit on December 18, 2012 and the document perfecting the administrative appeal (Appellant's Brief) was received by the

Appeals Unit on April 18, 2013. In the meantime, this proceeding was commenced on March 21, 2013.

Respondent's motion to dismiss was premised upon the argument that petitioner's challenge to the June 2012 merit parole denial determination was rendered moot by his November 27, 2012 reappearance before the Board for regular parole release consideration and the denial determination issued following such reappearance. By Decision and Judgment dated July 29, 2013 the Court, relying on the decision of the Appellate Division, Third Department, in *Gilsinger v. New York State Division of Parole*, 76 AD3d 1130, indicated its agreement with the argument advanced by respondent in her motion papers. In the Decision and Judgment of July 29, 2013 the Court also found as follows:

> "To the extent petitioner moves for leave to amend his petition by adding an additional cause of action challenging the June 2012 determination denying him merit parole release, the Court denies such application since the new cause of action would likewise have been rendered moot by petitioner's November 27, 2012 reappearance before the Parole Board for regular parole consideration and the denial determination issued after that reappearance. Petitioner's application for leave to submit a sur-reply is also denied."

Accordingly, the respondent's motion to dismiss was granted and the petition was dismissed as moot.

Petitioner now moves "TO RENEW A PRIOR ORDER PURSUANT TO CPLR §2221(e)(2)." In addition to petitioner's motion papers, the Court has received and reviewed the Affirmation in Opposition of Alicia M. Lendon, Esq., Assistant Attorney General, dated September 13, 2013, as well as petitioner's Reply thereto, verified on October 3, 2013 and filed in the St. Lawrence County Clerk's office on October 8, 2013.

In his motion papers petitioner asserts that "[t]he court's denial of petitioner's applicants [sic] for leave to submit an Amended Petition and/or a sur-Reply and its

granting of respondent's motion [to dismiss] were apparently based on its belief that the 'additional cause of action' [presumably the additional cause of action sought to be added in the proposed Amended Petition] is the principal claim challenging the June 2012 [merit parole denial] determination. Contrary to this possible belief, as stated in the Verified Petition, the Petition challenges, among other things, that the Parole Board failed to be in compliance with the mandates of Executive Law §259-c(4)." Petitioner then goes on to assert that the June 2012 merit parole denial determination was issued without proper enactment of the new "written procedures" mandated by the provisions of amended Executive Law §259-c(4). In this regard, he also asserts that the October 5, 2011 memorandum of Andrea W. Evans, then Chairwoman, New York State Board of Parole, does not function as the new "written procedures" since the memorandum " . . . has neither been adopted as a formal rule, pursuant to 9 NYCRR §800.1, nor has it been filed with the Secretary of State, pursuant to SAPA [State Administrative Procedure Act] §§ 202, 203, Executive Law 259-c(11)." Petitioner also argues that an exception to the mootness doctrine should have been applied since the issue of the Parole Board's compliance with the amended version of Executive Law §259-c(4) represents "a substantial issue and a matter of significant importance" that impacted not only the June 2012 merit parole denial determination but also the November 2012 regular parole denial determination.

Ignoring, for argument sake, the issue of whether petitioner's motion for leave to renew (CPLR §2221(e)) should properly been brought as a motion for leave to reargue (CPLR §2221(d)) the Court takes issue with petitioner's assessment that the Decision and Judgment of July 29, 2013 was issued based upon the Court's mistaken belief that the additional cause of action asserted in the proposed Amended Petition represented petitioner's principal challenge to the June 2012 merit parole denial determination. The

Decision and Judgment of July 29, 2013 constituted a broad determination that the causes of action set forth in the original Petition had been rendered moot by petitioner's November 27, 2012 Parole Board reappearance/regular parole denial determination and that any new cause of action set forth in the proposed Amended Peititon " . . . would likewise have been rendered moot . . ."

Notwithstanding the foregoing, the Court perceives that petitioner's previously-stated arguments with respect to the impact of the amendment to Executive Law §259-c(4) on both the June 2012 merit parole denial determination and the November 12 regular parole denial determination may have merited closer scrutiny. It is noted, however, that these identical arguments have since been considered - but rejected - by Decision and Judgment of this Court, dated December 19, 2013, in the context of a separate CPLR Article 78 proceeding (St. Lawrence County Index No. 141882) brought by petitioner to challenge the November 2012 determination denying him discretionary regular parole release.

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

ORDERED, that petitioner's motion is denied.

Dated: December 31, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court