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[*1]

Matter of Mendoza v Department of Corr. & Community Supervision
2013 NY Slip Op 50733(U) [39 Misc 3d 1225(A)]
Decided on May 13, 2013
Supreme Court, Dutchess County
Pagones, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on May 13, 2013

Supreme Court, Dutchess County

In the Matter of the Application of Jorge Mendoza, (DIN No.09A6144), (Fishkill CF), Petitioner,

against

Department of Correction & Community Supervision, DIVISION OF PAROLE APPEALS UNIT, ANDREA EVANS, CHAIRMAN, Respondent.

7611/12

JORGE MENDOZA

Petitioner, Pro Se

Fishkill Correctional Facility

P.O. Box 1245

Beacon, New York 12508

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James D. Pagones, J.

This petition for a judgment pursuant to CPLR Article 78 either directing respondent to grant petitioner Early Conditional Parole for Deportation Only ("ECPDO") status as to process him through the Bureau of Immigration and Customs Enforcement or directing respondent to conduct a *de novo* ECPDO hearing before a different panel of commissioners, is resolved as follows.

Petitioner is currently serving a nine (9) year determinate sentence for the crimes of Criminal Possession of a Controlled Substance, in violation of Penal Law §§220.21(1) and 220.16(1) (Answer and Return, Ex. 1).

Initially, the Court dismisses out of hand petitioner's claim that he is entitled to the relief he seeks by virtue of two (2), rather than three (3), commissioners being present at the hearing conducted on February 22, 2012. 9 NYCRR (Division of Paroles Rules and Regulations), [*2]§8002.2(b) states:

"The parole release interview shall be conducted by a panel of at least two (2) members of the Board of Parole."

Petitioner is not entitled to know of the internal deliberations of the respondent. (*Matter of Collins v. Hammock*, 96 AD2d 733, 734 [4th Dept. 1983].)

The fact that respondent's Appeals Unit failed to act on petitioner's administrative appeal within four (4) months did not deny him his due process right to an administrative appeal. (*New York ex rel. Sanchez v. Herbert*, 2 AD3d 1352, 1353 [4th Dept. 2003].)

If anything, the failure to act deprives respondent from asserting a failure to exhaust administrative remedies defense. Therefore, this Article 78 proceeding is properly before the Court.

"...New York has given no guarantee to a convicted defendant that he will be considered for parole...at any particular time." (*Russo v. NYS Board of Parole*, 50 NY2d 69, 75 [1980].) It is within the Board's inherent discretion to release an inmate. (*Tarter v. State of New York*, 68 NY2d 511, 517 [1986].) It is well settled that the decisions of the New York State Board of Parole are discretionary, and when made in accordance with the law, are not judicially reviewable. (*Matter of Hall v. New York Executive Department, Division of Parole*, 188 AD2d 791 [3d Dept.1992].)

The record indicates that on October 5, 2011, respondent's Chairwoman issued a memorandum in response to the changes made to Executive Law §259-c(4) which became effective October 1, 2011. Its purpose was to provide guidance to Board members as to the protocol to be followed when assessing the appropriateness of a defendant's potential release to parole supervision (Answer and Return, Ex. 11). The portion of the memorandum which is relevant to this proceeding is as follows:

> "Please know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. Consequently, in all cases you must consider:
>
> (i)the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii)performance, if any, as a participant in a temporary release program;
>
> (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 and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
>
> (v)any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
>
> (vi)the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law [*3]for a felony defined by in article two hundred twenty or article two hundred twenty-one of the penal law;
>
> (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 pre-sentence 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.
>
> *See* Executive Law §259-i(2)(c)(A). As noted by the New York State Court of Appeals in *Simon v. Travis*, 95 NY2d 470 (2000), the above-stated criteria reflect the strong rehabilitative component of section 259-i of the Executive Law.

Therefore, in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate had taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

Thank you."

In reading the seven (7) pages of the transcript of petitioner's hearing where a colloquy was transcribed, one word can be use to describe the scope, depth and manner in which it was conducted: perfunctory. The detailed factors outlined in the above cited memorandum were either addressed in a cursory fashion or not at all, particularly the last full paragraph. By way of example, petitioner was simply asked to confirm that he would reside with his son in the Dominican

Republic if released for the purpose of deportation. No other questions regarding his release plans, community resources, employment, education and training and support services available to him were explored (Ex. 11 at 7). This was after petitioner was questioned as to his reason for coming to the United States where opportunities to earn a living and have a productive life were available but chose, instead, to become immersed in the narcotics trade (Id at 5-6). Petitioner's response was to ask for forgiveness. The respondent's reply was to state, correctly, that the purpose of the hearing was to determine whether he should be released for the purpose of deportation. But, apparently no significance was given to petitioner's affirmative answer to what could be construed as a throwaway question that he had never served time in prison prior to his current offense (Id at 6-7).

Accordingly, that portion of the petition requesting a *de novo* hearing is granted. The petition is denied in all other respects. This matter is forthwith remanded to respondent, and respondent is directed to provide petitioner with a *de novo* hearing, before a different panel, which shall consider all of the statutory criteria and protocol outlined in the Chairwoman's [*4]memorandum, dated October 5, 2011, and all of the available information relevant to whether petitioner should be granted ECPDO status.

It is ordered further that respondent conduct the *de novo* hearing within sixty (60) days of the date of this order and a decision thereon be made within thirty (30) days of the hearing.

The Attorney General is directed to forthwith retrieve the documents which were submitted for *in camera* review and preserve the same through completion of the appellate process.

On this application, the Court considered the order to show cause supported by two (2) affidavits, verified petition with six (6) exhibits, answer and return with twelve (12) exhibits and petitioner's reply with two (2) exhibits.

The foregoing constitutes the decision, order and judgment of the Court.

Dated:Poughkeepsie, New York

May 13, 2013

ENTER

HON. JAMES D. PAGONES, A.J.S.C.

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