September 2021

Decision in Art. 78 proceeding - Schwartz, Jerrold (2006-11-17)

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Matter of Schwartz v Dennison

2006 NY Slip Op 52480(U) [14 Misc 3d 1211(A)]

Decided on November 17, 2006

Supreme Court, New York County

Schlesinger, J.

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Decided on November 17, 2006

Supreme Court, New York County

In the Matter of the Applicant of Jerrold Schwartz,, Petitioner For a Judgment under Article 78 of the Civil Practice Law and Rules,

against

Robert Dennison, Chairman, New York State Board of Parole, Respondent.

115789/05

Alice Schlesinger, J.

In April 2005, when petitioner Jerrold Schwartz had completed serving 2 and 2/3 years in prison, the minimum of the sentence imposed upon him, he went before the Parole Board. The Board denied his application with a 24-month hold until the next appearance in February 2007. Schwartz filed an administrative appeal which affirmed the Board's decision. He then commenced this Article 78 proceeding.

On April 18, 2006, I granted the petition for three essential reasons. First, I found that the Board had failed to rebut the presumption of release found in Correction Law §805. This law concerns inmates to whom a certificate of earned eligibility has been issued. Mr. Schwartz was one such individual and qualified in part since the minimum term of his sentence was less than 8 years. (See slip op. at pp. 11-15). Second, I found that the Board had relied on erroneous information (pp. 15-16). Finally, I found that the Board had departed from its guidelines without justification (pp. 16-17).

I remanded the matter for a de novo parole hearing before a new panel. However, that hearing has not yet occurred because respondent the Parole Board timely filed a Notice of Appeal and, pursuant to § 5519 of the CPLR, was granted an automatic stay. Petitioner then moved before the Appellate Division to vacate that stay, which application was denied. In Mr. Schwartz's latest papers, I learned that oral argument before the Appellate Division had been heard on September 22, 2006. While the parties await a decision, the stay, of course, remains in effect and Mr. Schwartz has not appeared before the new Board.

Petitioner's counsel has now moved to have this Court modify my earlier decision and replace the remand direction with an outright direction to the Parole Board to grant [*2]Mr. Schwartz release. The factual basis for this application was evidence recently obtained by him demonstrating a policy wherein the State's Department of Correctional Services intentionally fails to place sex offenders in the required Sex Offender Program in sufficient time to allow them to complete the program before the earliest possible date of release.

The rules governing the Sex Offender Program as reflected in the Sex Offender Program manual require a sex offender to be placed in the program at least eight months prior to the inmate's "earliest release date." The Department of Correctional Services has chosen to interpret that date as the conditional release date, which is many months or years later than one's minimum release date. The

rationale given for that interpretation is that there are limited spaces available in the program and that the list of offenders awaiting the Sex Offender Program is lengthy. In the opinion of the Department of Correctional Services:

"The likelihood that an inmate convicted of a sex offense will be released to parole supervision prior to his conditional release date, regardless of completed programs, is statistically unlikely. Therefore, reliance on the conditional release date as the earliest possible release date is reasonable." [See December 17, 2003 denial of grievance filed by an unnamed inmate, attached as an exhibit to petitioner's August 30, 2006 motion.]

In my April 18, 2006 opinion, I noted (at pages 2-3) that Schwartz had had a successful participation in a program for sex offenders and further that the Certificate of Earned Eligibility issued by the Department of Corrections also demonstrated his program participation. These facts are also referred to on page 14 of my decision wherein I stated:

He [Mr. Schwartz] demonstrated that he had successfully completed the Sex Offender Program in prison, to the point where he had assumed the role of mentor of others. Indeed, his Certificate of Earned Eligibility issued by the Commissioner confirmed this fact.

I further concluded that the Parole Board's decision was not rational in its finding that Schwartz would benefit from the completion of the Sex Offender Program. The Board based this finding on the fact that when petitioner first appeared before the Board, he still had a few weeks remaining in the program. However, the Commissioner's issuance of the Certificate represented that Mr. Schwartz had successfully completed the program. And what was more, as I pointed out, by the time Schwartz came before the Appeals Board, he had completed the program in its entirety. I therefore noted (at p. 14):

[Y]et the Appeals Unit relied on the Board's unsubstantiated and irrational finding that parole should be denied so that Schwartz could complete his program.

Therefore, this new evidence vis-a-vis the policy of the State in purposely postponing an inmate's entry into the Sex Offender Program and erroneously using the inmate's conditional release date as the "earliest release date" - which it clearly is not - to the extent it affected Schwartz's inability to technically complete the program at the time he came before the Board, gives credence to the fact that the Board had predetermined their decision and further undermines that decision and its affirmance.

Nevertheless, while the statutory stay remains in effect, this Court is powerless to substantially modify its prior judgment as requested by petitioner. This is particularly true since one of the issues argued at the appeal was whether this proceeding was properly [*3]venued in New York County.

Therefore, despite my belief that the newly obtained evidence (the substance of which respondent does not challenge) has arguable relevance on the merits, I am unable to grant the relief requested. Petitioner's motion is accordingly denied.

This constitutes the decision and order of this Court.

Dated: November 17, 2006

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J.S.C.

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