September 2021

# Decision in Art. 78 proceeding - Sultan, Jennifer (2015-04-01)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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JENNIFER SULTAN,

Petitioner,

-against-

TINA M. STANFORD, Chairwoman,
New York State Board of Parole,

Respondent.

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Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-14-ST6218 Index No. 5601-14

Appearances: The Legal Aid Society
Attorney For Petitioner
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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), was convicted of the crimes of criminal sale of a controlled substance in the 2nd degree, and conspiracy in the 4th degree. She was received into custody by DOCCS on May 8, 2013, and credited with 300 days of jail

time. The sentencing judge recommended that she participate in the Shock Incarceration Program (see Correction Law § 865, et seq.). The successful completion of the Shock Incarceration Program renders an inmate eligible for early release, in advance of her initial parole date or her conditional release date. The petitioner entered the Program on June 27, 2013, and completed it on December 26, 2013. The Parole Board reviewed her record on December 6, 2013, and on December 16, 2013 denied parole. The petitioner commenced the instant CPLR Article 78 proceeding challenging foregoing parole denial. The petitioner argues that the determination was arbitrary and capricious by reason of her successful completion of the Shock Incarceration Program, her otherwise clean criminal record, and because her COMPAS Risk Assessment Instrument evaluates her as having a low risk of recidivism. She also maintains that she was denied due process in that she was not was not permitted to personally appear before the Parole Board, but rather the determination was made upon review of the papers in her record.

After commencement of the instant proceeding the petitioner reappeared before the Parole Board and was granted an open date for parole, with May 11, 2015 being the earliest release date. Based upon the foregoing, the respondent has made a motion to dismiss the petition on grounds that the matter is now moot. The petitioner opposes the motion, arguing that she is challenging the constitutionality of Executive Law § 259-i (2) (e), which authorizes parole release determinations in connection with the Shock Incarceration Program to be made without a personal appearance before the Parole Board.[1] The petitioner also

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[1]Executive Law § 259-i (2) (e) recites:

"(e) Notwithstanding the requirements of paragraph (a) of this

points out that she is challenging the alleged failure of the respondent to implement the provisions of the 2011 amendments to the Executive Law (see Executive Law § 259-c [4]), including adoption of written procedures to incorporate risk and needs principles to evaluate inmates for release. She maintains that both issues raise substantial and novel issues which typically evade review and are likely to recur.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (see Hearst Corp. v Clyne, 50 NY2d 707, at 713 [1980], citations omitted; see also Matter of City of New York v New York State Public Employment Relations Board, 54 AD3d 480, 481-482 [3rd Dept., 2008]). "This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (Hearst Corp. V Clyne, supra, at 713-714; see also Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 810-811 [2003], cert denied 540 US 1017; Matter of NRG Energy, Inc. v Crotty, 18 AD3d 916, 918-919 [3rd Dept., 2005]). "An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is

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> subdivision, the determination to parole an inmate who has successfully completed the shock incarceration program pursuant to section two hundred sixty-seven of the correction law may be made without a personal interview of the inmate and shall be made in accordance with procedures set forth in the rules of the board. If parole is not granted, the time period for reconsideration shall not exceed the court imposed minimum." (Executive § 259-i [2] [e])

likely to recur, either between the parties or other members of the public; (2) is substantial and novel and (3) will typically evade review in the courts" (Coleman v Daines, 19 NY3d 1087, 1090 [2012], citing City of New York v Maul, 14 NY3d 499, 507, [2010], and Matter of Hearst Corp. v Clyne, supra, at 714-715).

It is well-settled that a reappearance before the Parole Board renders a challenge to a prior parole determination moot (see Matter of Bonez v State of New York, 100 AD3d 1235 [3d Dept., 2012]; Matter of Russo v New York State Division of Parole, 89 AD3d 1305 [3d Dept., 2011]; Matter of Davidson v Evans, 84 AD3d 1599 [3d Dept., 2011]). The only issue then, is whether the petitioner has established the exception to the mootness doctrine.

The issues concerning respondent's alleged failure to comply with the requirements of Executive Law § 259-c (4)[2], and respondent's alleged failure to apply risk and need principles in making parole release determinations have, since 2011, frequently been litigated in the Courts. The issues are not novel, and cannot be said to evade review.

With regard to Executive Law § 259-i (2) (e), the Court observes that it has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; and therefore, no constitutionally protected liberty interest is implicated by the Parole Board's exercise of its discretion to deny parole (see Matter of Rodriguez v Alexander, 71 AD3d 1354 [3rd Dept., 2010]; Barna v Travis, 239 F3d 169, 171 [2d Cir. 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v

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[2]The issue concerning the need to adopt formal regulations to implement Executive Law § 259-c (4) has been resolved in this Department in Matter of Montane v Evans (116 AD3d 197, 200-303 [ed Dept., 2014], appeal dismissed 24 NY3d 1052 [2014]).

Hammock, 605 F2d 661, 664 [2d Cir. 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept 2007]). However, even if this particular issue could be deemed substantial and novel, and assuming that it may recur, the petitioner has failed to demonstrate that it typically evades review. In this respect, the Court notes that in order to be eligible for participation in the Shock Incarceration Program, an inmate must be within three years of parole or conditional release (see Correction Law § 865 [1]). The Shock Incarceration Program is a six month program (see Correction Law § 865 [2]). For those inmates who are admitted to the Shock Incarceration Program soon after they become eligible, it would appear that they would have over two years to be heard on this issue in Supreme Court. The petitioner provides no data or information to support her nonfactual and conclusory assertion that the issue typically evades review in the courts.

The Court finds that matter is now moot, and that it has not been demonstrated that the exception to the mootness doctrine applies. The Court concludes that respondent's motion must be granted and the petition dismissed.

Accordingly, it is

**ORDERED,** that respondent's motion to dismiss the petition is granted; and it is

**ORDERED and ADJUDGED,** that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this

decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: April 1, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Amended Notice of Petition dated November 6, 2014
2. Petition
3. Affidavit of Jennifer Sultan, sworn to October 6, 2014 and Exhibits
4. Notice of Motion dated January 9, 2015, Supporting Affirmation and Exhibit
5. Affirmation in Opposition to Motion to Dismiss of Caroline Hsu, Esq., dated January 21, 2015