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Decision in Art. 78 proceeding - Cooper, Gary (2007-05-25)

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**Matter of Cooper v New York State Div. of
Parole**

2007 NY Slip Op 31479(U)

May 25, 2007

Supreme Court, New York County

Docket Number: 0400576/2007

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Louis B York
Justice

PART 2

COOPER

INDEX NO.

400576/07

MOTION DATE

MOTION SEQ. NO.

1001

MOTION CAL. NO.

- v -

1045 DIVISION OF PAROLE

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying decision.

RECEIVED

JUN 05 2007

IAS MOTION SUPPORT OFFICE

FILED

JUN 06 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/29/07

Check one: FINAL DISPOSITION

Louis B York J.S.C.
NON-FINAL DISPOSITION

RECEIVED TO REFERRED TO

AS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
In the matter of the Application of
Gary Cooper,

Index No.: 400576/2007

Petitioner,

For a Judgment pursuant to Article 78
Of the Civil Practice Law and Rules,

- against -

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

-----X

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Louis B. York, J.:

In 1976, Petitioner was convicted of murder in the second degree in New York County and received a sentence of 15 years to life in prison. Currently, Petitioner is incarcerated at the Auburn Correctional Facility, in Cayuga County, New York. Petitioner first was eligible for parole in 1990, but his parole applications always have been denied.

The parole hearing in question took place on May 23, 2006, at the Auburn Correctional Facility, in Cayuga County. Petitioner filed an administrative appeal challenging Respondent's decision. Respondent denied Petitioner's appeal at its principal office, in Albany County.

In February 2007, Petitioner filed this Article 78 proceeding in New York County, challenging the denial of Petitioner's application for parole. Petitioner argues, in essence, that the Board's "exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant." *Wallman v. Travis*, 18 A.D.3d 304, 307, 794 N.Y.S.2d 381, 386

001

(1st Dept. 2005). Moreover, Petitioner cites the entire history of his parole applications, commencing in 1990, to show that Respondent reflexively denies him parole based on his crime.

Pursuant to CPLR §§ 510 and 511, Respondent served Petitioner with a written demand to change venue to Albany County, where Respondent has its main office. Respondent now cross-moves to change venue to one of these counties. Petitioner has opposed Respondent's demand, stating that New York County, where the underlying crime took place, is an appropriate venue. In addition, petitioner contends that respondent is forum shopping and courts should not allow this conduct. For the reasons below, the Court grants Respondent's cross-motion.

CPLR § 506 (b) provides that:

A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

Under this statute, Cayuga County – where Respondent made the decision denying parole – is a proper basis for venue. However, Respondent seeks to transfer to Albany County, where the Respondent's principal office is located.

Respondent also asserts that Albany is an appropriate basis for venue because Petitioner's appeal was denied there on June 1, 2006. Petitioner denies that Respondent ever considered his appeal, apparently arguing that he was forced to deem the appeal denied because of Respondent's failure to act properly according to the statute. It is hard to determine the answer from Petitioner's papers; these papers detail his parole applications since 1990, and that makes it hard to determine the history of the parole decision at issue here. As the place where

Respondent's main office is located, Albany is a proper place for venue. Thus, the Court need not determine whether the appeal was decided.

The pertinent question, then, is whether venue is proper in New York County, where Petitioner commenced this proceeding. Respondent contends that this is an improper basis for venue and that, as Respondent has sought a change of venue in a proper fashion, the court must grant its application. Petitioner counters that venue is proper in New York County because his underlying offense, conviction, and sentencing are "material events" that "otherwise took place" there. Petitioner also argues that case law supports his interpretation of the statute.

The Court finds that *Howard v. New York State Board of Parole*, 5 A.D.3d 271, 773 N.Y.S.2d 300 (1st Dept. 2004) is dispositive here. In *Howard*, the petitioner argued that his New York County crime, trial, and sentencing were so closely interwoven with the parole determination that they constituted "material events" that "otherwise took place." See *Wallace v. New York State Board of Parole*, Index No. 400241/06, (Sup. Ct. N.Y. County May 18, 2006) (avail at 5/17/2006 N.Y.L.J. p. 22, col. 1) (quoting Pet.'s Brief to First Dept. in *Howard*). The First Department held that the respondent had waived its venue challenge and decided the issue on this basis. However, it also rejected the petitioner's argument in dicta when it stated that "venue in a case such as this should have been placed in the judicial district where the determination complained of took place or where respondent's principal office is located." *Id.* at 272, 773 N.Y.S.2d at 300. Several subsequent cases in this County have followed this precedent. See, e.g., *Weiss v. Dennison*, Index No. 108904/05 (Sup. Ct. N.Y. County January 19, 2006); *Wallace v. New York State Board of Parole*, Index No. 400241/06, (Sup. Ct. N.Y. County May 18, 2006) (avail at 5/17/2006 N.Y.L.J. p. 22, col. 1); *Gonzalez v. Dennison*, Index No. 402346/05 (Sup. Ct. N.Y. County October 31, 2005).

The Court notes that other well reasoned cases in this County have determined that *Howard* is not binding on the issue of venue. See, e.g., *Crimmins v. Dennison*, 12 Misc. 3d 726, 815 N.Y.S.2d 400 (Sup. Ct. N.Y. County 2006); *Schwartz v. Dennison*, Index No. 115789/2005 (Sup. Ct. N.Y. County May 8, 2006)(avail at 5/8/2006 N.Y.L.J. 19, (col. 1)). However, this Court is persuaded by the thorough discussion and comprehensive analysis conducted by the court in *Wallace v. New York State Board of Parole*, Index No. 400241/06, (Sup. Ct. N.Y. County May 18, 2006)(avail at 5/17/2006 N.Y.L.J. p. 22, col. 1). While a prisoner's underlying crime, conviction, and sentencing are factors that parole determinations reference, they are not "material events" that "otherwise took place." *Id.* This Court refers the parties to *Wallace* for its analysis of this issue.

For the reasons stated above, venue is proper in either Cayuga County, where the determination complained of took place, or Albany County, where Respondent's principal office is located. Respondent asks only for a transfer to Albany County, and does not explain why Cayuga is not an acceptable forum.

The court notes, however, that many courts have accepted the argument Petitioner currently propounds: that Respondent is forum shopping by attempting to transfer venue in all Article 78 parole denial cases to Albany County, where it has received overwhelmingly favorable decisions. See *Crimmins v. Dennison*, 12 Misc. 3d 726, 815 N.Y.S.2d 400 (Sup. Ct. N.Y. County 2006); see also Caher, John, "Decisions Split on Right Venue for Parole Cases," 5/15/2006 N.Y.L.J. p. 1, col. 3 (noting that "at a recent hearing (*Matter of William R. Phillips*, 103509/06,) Justice Marcy S. Friedman referred to the 'recent spate of decisions to transfer Article 78 proceedings challenging parole board determinations to Albany' and said that to the extent that they 'reflect an attempt to judge shop, that attempt should not be condoned by the

Court.”). Respondent’s failure to seek transfer to Cayuga County is therefore troubling. As noted above, either Cayuga or Albany county is appropriate under CPLR § 506 (b). Therefore, this Court exercises its discretion and transfers this matter to Cayuga County to avoid any impropriety, including forum shopping, on the part of Respondent.

Accordingly, it is

ORDERED that the cross-motion to change venue is granted, and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, Cayuga County, and the Clerk of this Court is directed to transfer the papers on file in this proceeding, Index Number 400576/2007, to the Clerk of the Supreme Court, Cayuga County, in Auburn New York, upon service of a copy of this order with notice of entry and the payment of appropriate fees, if any, by Respondent, and it is further

ORDERED that Respondent shall have thirty (30) days from the transfer of this proceeding to request that the Clerk assign this proceeding to a Justice for determination, if such a request is necessary.

ORDERED:

Dated: May 25, 2007

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE
[Signature]
Louis B. York, J.S.C.