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[*1]

Matter of Morris v New York State Dept. of Corr.and Community Supervision
2013 NY Slip Op 50603(U) [39 Misc 3d 1213(A)]
Decided on April 4, 2013
Supreme Court, Columbia County
Mott, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 4, 2013

Supreme Court, Columbia County

<p style="text-align: center;">In the Matter of Henry "Hank" Morris, Petitioner,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">New York State Department of Corrections and Community Supervision, BRIAN FISCHER, Commissioner of New York State Department of Corrections and Community Supervision, Department of Corrections and Community Supervision, NEW YORK BOARD OF PAROLE, ANDREA W. EVANS, Chairwoman of the New York Board of Parole, Respondents.</p>

5696-13

APPEARANCES:

Petitioner: Orlee Goldfeld, Esq.

Hollyer Brady, LLP

60 East 42nd Street, Suite 1825

New York, NY 10165

Respondents: Eric T. Schneiderman, Esq.

Attorney General of the State of New York

The Capitol

Albany, NY 12224-0341

Brian J. O'Donnell, Esq. Assistant Attorney General, of Counsel

Richard Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondent's August 21, 2012, decision denying him release on parole.

Respondent has moved to dismiss the Petition upon the ground of mootness because Petitioner appeared before the Board on November 14, 2012, at which time by a 2-1 vote he was denied parole for a third time. See, e.g., *Matter of Bonez v. State*, 100 AD3d

1235 (3d Dept 2012) and cases cited.

Petitioner argues that an exception to the mootness doctrine applies because the issues presented here (1) are likely to recur, (2) will evade judicial review, and (3) are substantial and novel. See, *Matter of Hearst Corp v. Clyne*, 50 NY2d 707, 714-5 (1980). See, also, *Matter of Midgette*, 70 AD3d 1039, 1040 (2d Dept 2010) and cases cited.

For the reasons that follow, an exception to the mootness doctrine applies and, accordingly, the motion to dismiss is denied.

I. Likelihood Of Recurrence

Based upon this case's history, the issues [FN1] raised here will no doubt recur. Petitioner already has appeared before the Parole Board five times, and has had three parole hearings [FN2], none of which, Petitioner asserts, was conducted in accordance with the law. In addition, Petitioner has filed three administrative appeals and two prior Article 78 proceedings, raising the same issues as here, yet, to date, none has been decided on the merits. Indeed, Petitioner's November 2012 hearing, relied upon by Respondent in support of its claim that this proceeding is moot, contains the very same issues. Moreover, Respondent has not denied the likelihood of recurrence, and in fact, asserts that there has been no legal defect in the Parole Board's procedures.

II. Potential For Evasion Of Review

These issues, specifically the legality of Petitioner's parole hearings and Respondent's compliance with Executive Law §259c-4, repeatedly have evaded judicial review as is demonstrated by the fact that Petitioner unsuccessfully has sought a determination on the merits of these very claims for more than a year. Illustrative thereof, is that Respondent, after denying Petitioner parole in February, 2012, waited some four months until Petitioner's administrative appeal was deemed to be denied in July, 2012, and Petitioner's Article 78 proceeding had been filed, before conceding that the hearing was unlawful and then offering him a *de novo* hearing. By reason thereof, Respondent unquestionably protracted judicial review of these claims.

III. Substantiality And Novelty Of The Issues

Petitioner argues that Respondent has never complied with the requirements of Executive [*2]Law §259-c(4), which was amended effective October 1, 2011, thereby rendering Petitioner's parole hearing illegal. No appellate court has determined whether Respondent has complied with the said legislative amendment, but Respondent contends that nothing more is required of it by reason thereof. Respondent argues that the amendment "dictates neither how new written procedures' are to be established, nor in what manner risk and needs principles' are to be incorporated within them." O'Donnell Affidavit, paragraph 15. Moreover, Respondent argues that the October 5, 2011 Evans Memorandum "serves as" the statutorily required procedures although it neither has been adopted as a formal rule (see, 9 NYCRR 8000.1), nor has been filed with the Secretary of State. See, e.g., SAPA §§202, 203, *Rent Stabilization Assn v. Higgins*, 83 NY2d 156, 175 (1993). Although Respondent stated in an April 18, 2012 response to a FOIL request, that written procedures "are currently being developed," to date no new procedures have in fact been instituted. Goldfeld Affirmation, paragraph 21. Further, authorities relied upon by Respondent [FN3] fail to establish that it has complied with the rule making requirements imposed by the amendment of Executive Law §259-c(4).

In addition, Petitioner asserts that Respondent was required by Corrections Law §71-a to prepare and consider a Transitional Accountability Plan (TAP) for Petitioner. Respondent argues that it was not required to do so. O'Donnell, paragraph 23. Petitioner argues that Respondent could not comply with the governing statutes if nothing measured Petitioner's rehabilitation or likelihood of success and no TAP was required. Petitioner argues:

With no procedures in place that tell the Board how to assess Mr. Morris's risks and needs the Board could not rationally find a reasonable probability that Mr. Morris will reoffend. Goldfeld Affirmation, paragraph 36.

Under these circumstances, this Court finds that the issues presented by Petitioner are substantial and novel.

Based on the foregoing, the motion to dismiss is hereby denied.

IV. Service Of Respondent's Answer

Petitioner was sentenced on February 17, 2011 to 1 1/3 to 4 years' imprisonment. He was presumptively eligible for parole on June 18, 2012. See, Correction Law §805. He has now served more than 25 months, far in excess of the 12 to 18 month guideline in his Inmate Status Report. His present Conditional Release date is October 18, 2013. Accordingly, time is of the essence in determining this case.

Accordingly, pursuant to CPLR §7804(f), the Court directs that Respondent file its Answer to the Petition with the Court by email and by regular mail and serve Petitioner's counsel [*3] with same by email and regular mail no later than 4:00 P.M. on April 9, 2013.

This constitutes the Decision and Order of this Court. The parties are hereby relieved of the requirements of CPLR §2220. The Court is forwarding the original Decision and Order directly to the Supreme Court Clerk for filing and entry. A photocopy of this Decision and Order is being forwarded to all parties who appeared in the action by email and by regular mail.

Dated:Claverack, New York

April 4, 2013

ENTER

Richard Mott, J.S.C.

Papers considered:

1. Notice of Verified Petition and Verified Petition, dated March 5, 2013 with Exhibits

A - S;

2. Notice of Motion, Affirmation of Brian J. O'Donnell, Esq., dated March 22, 2013, with Exhibits A - G;

3. Affirmation In Opposition of Orlee Goldfeld, Esq., dated April 1, 2013 with Exhibits T- X.

Footnotes

Footnote 1: The issues are discussed, *infra*, in II and III.

Footnote 2: Parole hearings have been held on February 21, August 21, and November 14, 2012. On two additional occasions, hearings were not conducted, once because the commissioners did not have Petitioner's file and the other because of commissioner recusals.

Footnote 3: *Matter of Gass v. New York State Board of Parole*, Index No. 12-13199 (Ulster County, 2/8/13), *Matter of Ortiz v. Evans*, Index No. 3933-12 (Albany County 12/3/12), *Matter of Rodriguez v. New York State Division of Parole*, Index No. 3932 (Albany County, 11/29/12), *Matter of Melendez v. Evans*, Index No. 1973-12 (Sullivan County 9/27/12), all of which are not binding on this Court. Cf. *Matter of Cotto v. Evans*, 2013 WL 486508 (St Lawrence County 1/22/13), *Matter of Mercer v. New York State Board of Parole*, Index No. 6330-12 (Albany County, 2/22/13).

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