February 2022

# Decision in Art. 78 proceeding - Ransom, Charles (2010-08-09)

**STATE OF NEW YORK**
**SUPREME COURT** **COUNTY OF FRANKLIN**

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In the Matter of the Application of
**CHARLES RANSOM, #85-A-1643**,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND ORDER**
**RJI #16-1-2010-0244.47**
**INDEX # 2010-601**
**ORI #NY016015J**

-against-

**NEW YORK STATE DIVISION**
**OF PAROLE,**
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Charles Ransom, verified on April 23, 2010 and filed in the Franklin County Clerk's office on May 3, 2010. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the February 2009 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on May 6, 2010 and has received and reviewed respondent's Notice of Motion to dismiss, supported by the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated June 24, 2010. Petitioner's opposing papers were filed in the Franklin County Clerk's office on July 26, 2010.

Respondent's motion to dismiss is premised upon the assertion that this proceeding is time barred under the four-month statute of limitations set forth in CPLR §217(1). According to the respondent the document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on June 25, 2009. Citing 9 NYCRR §8006.4(c), the respondent goes on to assert that the Appeals Unit then had four months to issue its findings and recommendation with respect to petitioner's

administrative appeal. Since such findings and recommendation were not issued within the four-month time frame, respondent's assert that "[o]n or about October 25, 2009, petitioner's administrative remedies were deemed exhausted, and the Parole Board's determination became final and binding." (Citations omitted). Respondent concludes its argument by asserting that petitioner therefore had until February 25, 2010 to timely commence a CPLR Article 78 proceeding challenging the February, 2009 discretionary parole denial determination. The Court notes that this proceeding was not commenced until May 3, 2010, when the petition was filed in the Franklin County Clerk's office. *See* CPLR §304(a).

In his opposing papers petitioner asserts that the respondent effectively granted him additional time to amend or supplement the document perfecting his administrative appeal when, under cover letter dated July 22, 2009, the Appeals Unit provided him with a transcript of the underlying parole interview and advised him that "[i]f after reviewing the transcript you wish to submit a supplemental brief, you may do so until **August 28, 2009**." (Emphasis in original). Although there is nothing in the record to suggest that petitioner submitted a supplemental brief, he argues that his administrative remedies could not be considered exhausted until on or about December 28, 2009 (four months after July 28, 2009). For the reasons set forth below, the Court agrees.

Petitioner's notice of administrative appeal, received by the Division of Parole Appeals Unit on February 27, 2009, included a request for a transcript of the minutes of the underlying parole hearing with a notation that such transcript was "necessary for the preparation" of the administrative appeal. By regulation, petitioner had four months from the date of filing of his notice of administrative appeal to perfect such appeal ". . . unless an extension is granted by the appeals unit . . ." 9 NYCRR §8006.2(a). Although petitioner met the initial perfection deadline, he did so without benefit of the requested

transcript. When the Appeals Unit subsequently provided petitioner with a copy of the transcript, on or about July 22, 2009, it specifically authorized petitioner to submit a supplemental brief on or before August 28, 2009. Under these circumstances the Court finds it difficult to perceive how the Appeals Unit could have meaningfully commenced its review of petitioner's administrative appeal until that August 28, 2009 deadline had passed. Accordingly, the Court agrees that the Appeals Unit had until on or about December 28, 2009, to issue its findings and recommendation under the provisions of 9 NYCRR §8006.4(c). With that in mind, the Court must still determine whether or not this proceeding was timely commenced by the filing of the petition on May 3, 2010.

Petitioner asserts that his petition " . . . was received by the Franklin County Clerk's Office and Verified on April 23, 2010" and that he is not responsible for the 11-day delay in the filing of the petition. Petitioner should be aware, however, that the April 23, 2010 verification date does not refer to any action on behalf of the Franklin County Clerk but, rather, to his own verification of the veracity of the contents of the petition, sworn to before a notary at the Franklin Correctional Facility on April 23, 2009 before mailing. The Court notes that petitioner's cover letter to the Court accompanying his final mailing of the petition and supporting documents is dated April 28, 2010. Although the exact date of mailing cannot be determined, it obviously could not have been before April 28, 2010. In any event, to the extent petitioner argues that the petition was mailed to the Court for filing on or before April 28, 2010 (four months from December 28, 2009), although not filed until May 3, 2010, this Court notes that in *Grant v. Senkowski*, 95 NY2d 605, the Court of Appeals specifically declined to adopt a "mailbox rule" whereby the papers of *pro se* inmate's would be deemed "filed" upon delivery to prison authorities for forwarding to the appropriate court. Rather, the Court of Appeals held that it was " . . . the Legislature's intent to treat litigation papers as 'filed' within the meaning of CPLR 304 only upon the

physical receipt of those papers by the court clerk or the clerk's designee." *Id* at 609. The Court therefore finds that this proceeding was not commenced until the petition was filed in the Franklin County Clerk's office on May 3, 2010, regardless of the fact that the petition was obviously mailed to the Court prior to that date. The rejection of petitioner's argument on this point, however, is only significant to the extent the four-month statute of limitations set forth in CPLR §217(a) commenced running on December 28, 2009 and therefore expired on April 28, 2010.

The burden of proving the applicability of the affirmative defense of statute of limitations rest upon the party asserting it, here the respondent. *See Jackson v. Fischer*, 67 AD3d 1207 *and Brush v. Olivo*, 81 AD2d 852. "It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof." *Warburton v. Department of Correctional Services*, 251 AD2d 831, 832, *quoting Biondo v. New York State Board of Parole*, 60 NY2d 832, 834. *See Jackson v. Fischer*, 67 AD3d 1207.

Under the unusual regulatory scheme at play in this proceeding, respondent asserts that the four-month statute of limitations set forth in CPLR §217(a) commenced running not upon petitioner's receipt of a final administrative determination but, rather, upon administrative inaction as of a certain date. 9 NYCRR §8006.4(a)(2) provides, in relevant part, that a perfected administrative appeal will be reviewed by the Appeals Unit and " . . . the appeals unit will issue written findings of fact and/or law, and recommend disposition of the appeal. The written findings and recommendation of the appeals unit shall thereupon be mailed to the inmate . . ." "Upon the issuance by the appeals unit of its findings and recommendation the appeal will be presented as soon as practicable to three members of the Board of Parole for determination." 9 NYCRR §8006.4(b). "Should the appeals unit fail to issue its findings and recommendation within four months of the date

that the perfected appeal was received, the appellate may deem this administrative remedy to have been exhausted, and thereupon seek judicial review of the underlying determination from which the appeal was taken. In that circumstance, the division will not raise the doctrine of exhaustion of administrative remedy as a defense to such litigation." 9 NYCRR §8006.4(c).

Although the Court has determined that the Appeals Unit in the case at bar had until December 28, 2009 to issue its findings and recommendation, the petitioner, incarcerated in DOCS custody, would have no way of knowing that the Appeals Unit failed to issue such findings and recommendation on or before December 28, 2009 - and thus that the four-month statute of limitations had therefore commenced running - until a reasonable period of time elapsed after December 28, 2009 without his receipt of a copy of the findings and recommendation. It is clear to the Court, therefore, that the statute of limitations in this case cannot be considered as having commenced running on December 28, 2009. Without attempting to establish any broadly applicable rule as to how soon after the expiration of a 9 NYCRR §8006.4(c) deadline, without the Appeals Unit having issued its findings and recommendation, it is reasonable to conclude that the four-month statute of limitations has commenced running, the Court finds that statute of limitations in the case at bar did not commence running before January 3, 2010 and, therefore, this proceeding was timely commenced on May 3, 2010.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

**ORDERED**, that respondent's motion to dismiss is denied; and it is further

**ORDERED**, that respondent serve a copy of his answering papers on the petitioner on or before August 27, 2010, and that he simultaneously mail his original

answering papers to the Clerk of the Court for filing, and mail a further copy of said answering papers to the undersigned; and it is further

**ORDERED**, that petitioner mail his original Reply to the respondent's answering papers to the Court Clerk's office, Franklin County Courthouse, 355 West Main Street, Suite 3223, Malone, New York, 12953, on or before September 10, 2010.

**Dated:** August 9, 2010 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice