

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

MATTER OF JOSEPH J. DEAN	x	INDEX NO.: 22978/02
- against -		BY: PRICE, J.
NEW YORK STATE BOARD OF PAROLE		DATED: NOVEMBER 15, 2002
	x	MOTION CAL. NO.: 12

MOTION DATE: OCTOBER 1, 2002

In this Article 78 proceeding petitioner Joseph J. Dean seeks a judgment annulling the determination of respondent New York State of Parole dated July 19, 2002 which denied his request for a discharge from parole and deferred the request to his maximum expiration date.

On October 28, 1988 petitioner Joseph J. Dean was indicted in Nassau County for five counts of manslaughter in the second degree, vehicular assault in the second degree and operating a vehicle while under the influence of alcohol. These charges stemmed from Mr. Dean's driving a vehicle while intoxicated on July 23, 1988, at which time his vehicle crashed into another vehicle, killing five people. On September 30, 1988, Mr. Dean entered a guilty plea to the charge of manslaughter in the second degree (five counts), a C Felony and operating a vehicle while under the influence of alcohol, a misdemeanor, and was sentenced to

an indeterminate sentence of a minimum term of 5 years and a maximum term of 15 years for the manslaughter charge and a term of one year for operating a motor vehicle while under the influence of alcohol, which ran concurrently for one year at the Nassau County Correctional Facility. Mr. Dean's driver's license was revoked, and a \$500 fine and a \$100 surcharge were imposed. At the time the crimes were committed, Mr. Dean was 25 years old. Petitioner served ten years of his sentence, including five years in a work release program which included parole supervision. Petitioner's request for release to parole was denied on three separate occasions. Petitioner was released to parole in 1998 upon reaching his conditional release date, and thereafter attended the required state sponsored alcohol program. Petitioner states that throughout the past 14 years he has been subject to alcohol and drug testing and that he has not been subject to any disciplinary actions. Petitioner was conditionally released to parole supervision on July 19, 1998 with a maximum expiration date of July 23, 2003. Petitioner was issued a temporary certificate of release from disabilities on December 26, 2001, which removed all legal bars and disabilities to employment, license and privilege except those pertaining to firearms under sections 265.01(4) and 400.00 of the Penal Law and except the right to be eligible for public office. Mr. Dean states that he has earned four college degrees and that he

is now employed full time as a software engineer, and part-time as an adjunct professor at a local college.

Petitioner was eligible to be absolutely discharged from parole on July 19, 2001 and his case was reviewed under the provisions of section 259-j of the Executive Law. On August 1, 2001, the Division of Parole deferred or postponed his discharge from parole on the grounds that "THE NATURE AND CIRCUMSTANCES OF THE INSTANT OFFENSE NEGATES EARLY DISCHARGE AT THIS TIME". The matter was deferred or postponed for 12 months, and was scheduled for re-submission in July 2002. On July 19, 2002 the Division of Parole again reviewed the matter and in a memorandum dated July 22, 2002 deferred petitioner's discharge from parole to the maximum expiration date on the grounds that "SUBJECT'S INSTANT OFFENSE INVOLVED DRIVING WHILE INTOXICATED AND CRUSHING INTO A VEHICLE KILLING 5 PEOPLE. HIS ADJUSTMENT UNDER SUPERVISION SHOULD CONTINUE TO BE MONITORED ESPECIALLY TO MAKE CERTAIN THAT HE NOT DRINK."

Petitioner Joseph Dean, pro se, thereafter commenced the within Article 78 proceeding and seeks a judgment vacating respondent's July 2002 denial of a discharge from parole on the grounds that it is arbitrary and capricious and so irrational as to boarder on impropriety. Petitioner further seeks an order granting him a discharge from parole. It is asserted that the only change in petitioner's status from the first deferral in 2001 to the

current deferral to the maximum release date of July 2003 was the issuance of the temporary certificate of relief from disabilities, and that there was no change in the nature of the offense.

Respondent New York State Board of Parole asserts in its answer as an objection in point of law that the choice of venue in Queens County is improper, and that the proper situs of venue for this proceeding is either New York County or Albany County. As a second objection in point of law, petitioner asserts that the petition fails to sufficiently allege facts or state a cause of action to entitle him to relief. Finally it is asserted that the denial of discharge from parole was in the best interests of society, and therefore respondent's determination was neither arbitrary nor capricious and nor irrational.

CPLR 506(b) states that an Article 78 "proceeding against a body or an 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 material events otherwise took place, or where the principal offices of the respondent is located." Here, petitioner resides in Queens County, is presently under parole supervision in this county, and the submission requesting the discharge from parole was made in Queens County. Respondent's determination, however, was made in New York County, and the principal office of the respondent is in Albany County.

Respondent, therefore, asserts that as none of the material events took place in Queens County, the proceeding was improperly commenced in Queens County and that venue should have been sited in either New York County or Albany County. The court finds that although respondent is correct in its assertion that venue should have been sited in New York or Albany County, the selection of an incorrect venue in this instance is not jurisdictional and therefore does not warrant the dismissal of the proceeding. (See, McLaughlin, Supplementary Practice Commentaries, McKinney's Consolidated Laws of NY, Book 7B, CPLR C506:1 at 28-29.) The court further notes that respondent is not entitled to a change of venue as of right under CPLR 506(b), as it failed to serve a demand for a change of venue (CPLR 511[a]) followed by a motion, if the demand was not acceded to, within 15 days after service thereof (CPLR 511[b]).

Executive Law § 259-j provides as follows: "If the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interests of society, the board may grant such a discharge prior to the expiration of the full term or maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years. A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted. No such discharge shall be granted unless the board of parole is

satisfied that the parolee, otherwise financially able to comply with an order of restitution and the payment of any mandatory surcharge previously imposed by a court of competent jurisdiction, has made a good faith effort to comply therewith." The fact that petitioner was issued a temporary certificate of relief from disabilities pursuant to section 703 of the Correction Law, does not create a presumption in favor of a discharge from parole. (See, e.g., Correction Law § 805 [presumption created for parole release by the issuance of a certificate of earned eligibility].) The Board of Parole, in the exercise of its discretion, determined that it was not in the best interests of society to discharge petitioner from parole supervision and to continue to monitor him, in order to make certain that he does not drink. The Board's determination was based upon the fact that petitioner's conviction for manslaughter was based upon his driving while intoxicated and causing the death of five people. In view of the fact that the decision to maintain parole supervision of the petitioner and to defer the determination as to whether he should be discharged from parole was made in accordance with law, it is not subject to judicial review. (See, Gallo v Travis, 245 AD2d 448; Matter of Secilmic v Keane, 225 AD2d 628; Matter of Ganci v Hammock, 99 AD2d 546, 548.)

In view of the foregoing, petitioner's request to vacate respondent's determination of July 19, 2002 and memorandum of

July 22, 2002, and to discharge him from parole supervision is denied and the petition is dismissed.

Settle judgment.

J.S.C.