

**Matter of Marciano v Goord**

2006 NY Slip Op 30266(U)

September 8, 2006

Supreme Court, New York County

Docket Number:

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK  
J.S.C.

PART 2

Index Number : 102892/2006  
MARCIANO, SALVATORE

vs  
GOORD, GLENN S.

- Sequence Number : 001  
T. ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Dated: 9/8/06

Luy  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

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

----- X

In the Matter of the Application of  
SALVATORE MARCIANO,

Petitioner,

INDEX NO.  
102892/06

For a Judgment Pursuant to CPLR Article 78

-against-

GLENN S. GOORD, Commissioner of the New York  
State Department of Correctional Services; WILLIAM  
J. CONNOLLY, Superintendent of the Edgecombe  
Correctional Facility; and ROBERT DENNISON,  
Chairman of the New York State Board of Parole,

Respondents.

----- X

**LOUIS B. YORK, J.:**

Petitioner Salvatore Marciano brought this Article 78 proceeding to vacate the decision of respondent New York State Board of Parole (the "parole board") which rescinded the merit-time parole release date previously granted to petitioner and, upon such vacatur, to immediately release petitioner to parole supervision. Alternatively, petitioner seeks to be restored to the temporary release program of respondent New York State Department of Correctional Services ("DOCS") from which he was removed by respondents.

**Background**

Petitioner is a 45-year-old man with a history of heart disease who has been married since 1991 and has a teenage son. He has no history of violence or domestic abuse, and has not been convicted of a violent crime. Petitioner has a degree in funeral service administration from

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

the American McAllister Institute, and worked in that industry at the beginning of his career. He entered the stock brokerage business in the mid-1980's and a few years later joined his twin brother's brokerage firm, A.S. Goldman & Co.

Petitioner and his brother, along with others at the firm, was convicted of three class B felonies in 2001: enterprise corruption, criminal possession of stolen property in the first degree and fraud in the sale of securities, and was sentenced to an aggregate indeterminate term of five to 15 years. He had no prior arrests or convictions.

In September 2004, approximately three years into his sentence, petitioner was admitted to DOCS' temporary release program, which allowed him to live and work outside the prison for five days a week, and spend only two days a week in confinement at the Edgecombe Correctional Facility. By all reports petitioner did unusually well both in and out of prison during his participation in the work release program, and in March 2005 earned a certificate of earned eligibility and a merit-time parole date of August 31, 2005, an advance on his parole eligibility date of July 5, 2006. Nonetheless, on April 25, 2005 petitioner was denied presumptive release, for which he was eligible (see Correction Law § 806). According to respondents' merit time administrator, Anthony Sumigray, "[t]he denial of [petitioner]'s presumptive merit release was founded upon the circumstances of his underlying offense" (Sumigray supporting affidavit ¶ 5, at respondents' exhibit A). In a portent of things to come, Petitioner himself was given only a meaningless, formulaic catch-all for the denial rather than a specific reason: "either due to the nature and circumstances of your crime, or due to your history, character or background, or due to one or more questions raised by certain information in your file, it has been determined that the parole release decision can best be made following your

appearance before the board of parole" (tab 5 to Sumigray affidavit).

In January 2005, before the revocation of petitioner's participation in the work-release program, the Certificate of Earned Eligibility and the merit time parol date, petitioner separated from his wife, who filed for divorce in February 2005 but subsequently withdrew her action. The separation was not friendly. As alleged by petitioner, his wife began threatening him and his new girlfriend and sought to force him to give her more money and to sign their New Jersey home over to her. One of her threats was that she would make sure petitioner was not paroled. According to petitioner and undisputed by the record, she called him repeatedly at work and at his parents' home, where he lived while on work release. The situation was serious enough that in June 2005 petitioner's matrimonial counsel sought help from his wife's attorneys in curbing her destructive conduct (see petitioner's Appendix at A-18). Petitioner reported these threats on several occasions to both his parole officer, Beverly Pittman ("Pittman") and his counselor at Edgecombe, but apparently to no avail.

On August 22, 2005, nine days before petitioner's scheduled merit-time parole date, his wife filed a report with the police in Monmouth County, New Jersey, alleging that petitioner had threatened to kill her (see respondents' exhibit G). The report was forwarded to respondents. On August 24, when petitioner returned to Edgecombe from his scheduled five-day work release, he was placed 'on hold' and advised of his wife's complaint by Pittman (see respondents' exhibit H). On August 25, the Edgecombe superintendent visited petitioner and told him he would be 'going upstate' as a result of his wife's allegations. On the same day, petitioner was brought before respondents' temporary release committee ("TRC"), and was questioned about his wife's allegations. According to petitioner, he denied threatening to kill her and told them what had

been going on since the break-up of his marriage. The committee recommended to suspend petitioner from the temporary release program pending "completion of ongoing investigations re: police complaints filed against him" (respondents' exhibit I).

On August 26, 2005, while those investigations were still going on, respondents concluded that petitioner should be stripped of everything: "he has violated temporary rules and will be programmatically removed from the temp rel program. [H]is merit certificate has been cancelled, his merit open date has been cancelled. [P]lease make sure that he is NOT released on Wednesday 8-31-05" (tab 8 to Sumigray affidavit).

On August 29, senior parole officer F. Bush, who conducted respondents' investigation into petitioner's alleged threats against his wife, voided petitioner's merit time release date of August 31, noting that petitioner had "incurred Temporary Release violations resulting in his removal from the program. He will make an Initial appearance at the 5/06 parole board" (respondents' exhibit J). It is unclear what comprised Bush's investigation. From his report, it appears that he only interviewed petitioner's wife. Based on his investigations, Bush "determined that the Marcianos [we]re experiencing bitter divorce proceedings" and noted that despite the police's recommendation that she seek a restraining order and Bush's own recommendation that she seek an order of protection, petitioner's wife declined to do either, nor take any other measure to protect herself from petitioner's purported threat (respondents' exhibit K). Respondents' investigation of the complaint, concluded prior to August 30 (see *ibid.*), did not adduce anything that could lead to petitioner's arrest. No misbehavior report appears to have been filed (see 7 NYCRR § 251-3.1[a]), and no disciplinary charges were ever brought against petitioner. Nonetheless, none of respondents' decisions were rescinded.

On August 30, 2005, again without any notice, and without being told any particulars about his wife's allegations or about the foregoing determinations by respondents, petitioner was brought to another hearing before the TRC, this time with a record made (see respondents' exhibit F). Petitioner was not given a copy of the police report, nor advised of his right to call witnesses and introduce evidence on his own behalf. When asked to make a statement at the hearing, petitioner denied having threatened his wife and again told of her harassment and threats against him. Pittman, who was at the hearing sitting as a member of the TRC, did not back up respondent, although she subsequently confirmed that he had told her of his wife's threats against him prior to August 30 (see petitioner's Appendix at A-27). On the next day, petitioner's scheduled release date of August 31, 2005, instead of being released on parole as anticipated, petitioner was presented with the form formally removing him from the work release program (Appendix at A-16; respondents' exhibit L), and transferred to the Oneida Correctional Facility in Rome (respondents' exhibit M).

### **Administrative Appeals**

In late September 2005, petitioner submitted administrative appeals of respondents' decisions to (i) remove him from the temporary release program (letter to director of temporary release department at Appendix, A-1), (ii) revoke his merit time (letter to DOCS commissioner at respondents' exhibit N), and (iii) rescind his scheduled merit-time release date of August 31, 2005 (letter to division of parole's chairman at respondents' exhibit N).

#### **A. Removal from Temporary Release Program.**

Petitioner's administrative appeal of his removal from the temporary work release

program was supported, *inter alia*, by letters from his work release employer and a co-worker praising his work and character (Appendix at A-21 and A-22), and from his girlfriend (Appendix, A-23), mother (Appendix at A-28) and Pittman – who gave the corroboration she had withheld at the TRC hearing (Appendix at A-27) – documenting the threats made by petitioner's wife.

That appeal was denied on November 8, 2005 (see determination at Appendix, A-32). DOCS stated reason for its decision was "Program Part." The only explanation was in the "reviewer's comments":

After reviewing your overall program adjustment and the serious nature of the police report where it indicated you threatened to kill your wife, Edgewood correctional facility TRC & the superintendent concurred with your removal. Such behavior indicates an inability to adhere to temporary release rules and regulations. Removal is warranted.

(*ibid.*). There is no indication that the reviewer (B. King) considered any of the issues raised in petitioner's appeal, including his proclamation of innocence, or any of the supporting documentation submitted by him.

#### **B. Revocation of Merit Time.**

The only response to petitioner's appeal of his merit-time revocation was a letter from DOCS' deputy commissioner and counsel (at respondents exhibit O), which closed "I trust this information will be useful to you" and 'explained' rather than reviewed the revocation decision.

After making the startling statement that petitioner had been granted presumptive release pursuant to Correction Law § 806 and "approved to be released without the necessity of an appearance before the Board of Parole" (diametrically contradicting DOCS' denial of presumptive release to petitioner at tab 5 to Sumigray affidavit), DOCS' counsel explains that

DOCS' directive no. 4790 (merit time) mandated the revocation of petitioner's merit time because petitioner had been removed from the temporary release program for a "reason other than an intervening circumstance beyond [petitioner's] control" since "the basis for the Temporary Release Program removal was the serious nature of the poice complaint" (ibid.).

**C. Rescission of Scheduled Release Date.**

Petitioner's appeal of the rescission of his merit-time scheduled release date was denied by letter from the division of parole's counsel (at respondents' exhibit O) on the ground that the parole board had "no legal authority to parole [petitioner] at the eligibility date" because the merit time that had resulted in such date had been revoked as a result of petitioner's removal from the temporary release program. As a result, the parole board would not consider petitioner before his initial parole eligibility date of July 5, 2006.

In February 2006, petitioner commenced this Article 78 proceeding.

**Procedural Issues**

On May 17, 2006, coincidentally the date of oral argument and final submission of this Article 78 proceeding, petitioner appeared before the parole board (consistent with Bush's August 29, 2005 memorandum, at respondents' exhibit J) and was denied parole with reconsideration deferred for 12 months. However, that decision is not before the court.

**Petitioner's Constitutional Rights**

The gravamen of petitioner's claims is that respondents violated his constitutional rights. Respondents contend that petitioner received all the constitutional protection he was

entitled to. Although no one could think it from respondents' conduct, petitioner, albeit an inmate in the total control of respondents, has rights which respondents may not trample at will.

"A convict sentenced to imprisonment is under the protection of the law ..." (Civil Rights Law § 79-c). "There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners ... retain right of access to the courts.... Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law" (Wolff v. McDonnell, 418 US 539, 555-556 [1974], citations omitted).

In the context of this proceeding, the fundamental aim of those basic due process rights is the protection of petitioner's liberty interests. "A state prison regulation by which corrections officials dispense privileges or punishments may create a liberty interest sufficient to implicate due process concerns when a denial or punishment constitutes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life (Romer v. Morgenthau, 119 F Supp 2d 346, 357 [SDNY 2000], citing Sandin v. Conner, 515 US 472, 484 [1995]; Doe v. Coughlin, 71 NY2d 48, 54-55 [1987], rearg den 70 NY2d 1002 [1988], cert den 488 US 879 [1988], citing Matter of Russo [New York State Board of Parole], 50 NY2d 69, 73-74 [1980]). "[P]risoners ... faced with serious sanctions of whatever kind, are entitled to fair written notice and hearings on those charges" (Matter of Amato [Ward], 41 NY2d 469, 470 [1977], citing Wolff v. McDonnell, supra, 418 US at 563-564).

While an inmate does not have a right to be admitted to a work release program (Romer v. Morgenthau, supra, 119 F Supp 2d at 358-359; Greenholtz v. Inmates of Nebraska

Penal and Correctional Complex, 442 US 1, 9 [1979]), once he is accepted to the program he does have a protectible liberty interest when that work release is revoked (Kim v. Hurston, 182 F3d 113, 117 [2d Cir 1999]). "[T]here is a liberty interest in continued participation in a temporary release program, such as the work release program in which [petitioner] had been participating" (People ex rel. Adler v. Beaver, 12 AD3d 1136 [4th Dept 2004]). "[T]he State of New York, in establishing the Temporary Release Program..., created a liberty interest that may not be terminated without an individualized due process hearing" (Roucchio v. Coughlin, 923 F Supp 360, 375 [EDNY 1996], citing Tracy v. Salamack, 572 F2d 393, 396 [2d Cir 1978] and Severino v. Negron, 996 F2d 1439, 1442 [2d Cir 1993]). Petitioner's removal from the temporary release program, which allowed him to spend five nights a week outside Edgecombe as a contributing member of society, to full-time incarceration upstate was a significant encroachment on his liberty interests (see Matter of Anderson [Williams], 173 Misc 2d 65, 68 [Sup Ct, NY Co, Goodman, J, 1997]; Roucchio v. Coughlin, *supra*, 923 F Supp at 374-375). "The Due Process Clause protects inmates against 'atypical and significant' deprivation of liberty ..., including withdrawal of work release. Thus, prisoners are entitled to procedural due process before they are subjected to such a deprivation of liberty" (Friedl v. City of New York, 210 F3d 79, 84 [2d Cir 2000], citations omitted).

Inmates also have similar rights with respect to their merit time credits (see Wolff v. McDonnell, *supra*, 418 US at 558). Revocation of good time credits must comport with procedural due process requirements (see Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 US 445, 453 [1985]; Friedl v. City of New York, *supra*, 210 F3d at 85). So,

too, with a certificate of eligibility issued pursuant to Correction Law § 805, since that statute "falls squarely within the category of parole statutes that affirmatively create a liberty interest" (Walters v. Ross, n.o.r., 1992 WL 398307, \*3 [EDNY 1992], citing Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, *supra*, 442 US at 11-15 and People ex rel. Hunter v. Bara, 144 Misc 2d 750, 751-752 [Sup Ct, Richmond Co, Kuffner, J, 1989]). In short, although all the things at issue here are privileges which petitioner may not claim as of right, once they have been granted they cannot be taken away without due process.

By contrast, "since 'a person's rightful liberty interest is extinguished upon conviction, there is no inherent constitutional right to parole.'... Nonetheless, when a state establishes a sentencing scheme which creates a legitimate expectation of early release from prison, there does exist a liberty interest which is entitled to constitutional protection" (People ex rel Herbert [New York State Board of Parole], 97 AD2d 128, 131 [1st Dept 1983], app wdn 62 NY2d 617 [1984], citing Matter of Russo [New York State Board of Parole], *supra*, 50 NY2d at 73 and Greenholtz v. Nebraska Penal Inmates, *supra*, 442 US 1). "In other words, while there is no due process right to being **granted** parole, there is a due process right to have the decision made only in accordance with the statutory criteria" (Graziano v. Pataki, 2006 WL 2023082 at \*8 [SDNY, Brieant, J, 2006]).

Finally, petitioner has the constitutional right to expect justice from this court. The "right to petition government for redress of grievances [i]s among the most precious of the liberties safeguarded by the Bill of Rights" (Franco v. Kelly, 854 F2d 584, 589 [2d Cir 1988], citing United Mine Workers v. Illinois State Bar Association, 389 US 217, 222 [1967]).

### Temporary Release Program

Petitioner argues that in removing him from the temporary release program respondents violated the applicable regulations (7 NYCRR §§ 1904.2, 1904.1) and his due process rights by: (i) not giving him notice of the specific reasons for his removal prior to his appearance before the TRC; (ii) not giving him a copy of the police report or even specifics about his alleged threat to his wife; (iii) not giving him a 'charging document' which could enable petitioner to answer the charges and prepare an adequate defense; (iv) not allowing petitioner to call witnesses and present evidence, nor advising him of his right to do so; and, (v) never deciding the merits of the accusation against petitioner, much less establishing he violated any of respondents' rules or regulations prior to revoking his participation in the temporary release program. Petitioner also contends that the TRC hearing was a sham because the decision to remove him from the program was made well before the August 30 hearing, as evidenced by the Edgecombe superintendent's August 25 statement that he would be going upstate, and by Bush's August 30 report, which stated "that because of the violent nature of the threatening behavior of [petitioner] DOCS mandates removal from the program" (Appendix at A-17).

"An inmate may be removed from his program ... if 'his continued participation in a program of temporary release is inconsistent with the safety of the community,'" but not unless it is found "that the subjective criteria in section 1904.1 have been met.... [A]ll relevant factors should be considered in order to make certain that the hearing is meaningful" (Severino v. Negron, *supra*, 996 F2d at 1441, citing 7 NYCRR § 1904.1 and Morrissey v. Brewer, 408 US 471, 487-488 [1972]). Removal from a temporary work release program, even if warranted, cannot be sustained if it "was accomplished without the minimal requirements of procedural due

process" (Kim v. Hurston, *supra*, 182 F3d at 115).

An inmate cannot be removed from the temporary release program without a prior hearing (Tracy v. Salamack, *supra*, 572 F2d 393), on at least 24 hours' notice (7 NYCRR § 1904.2(l)(1)), in which the inmate has a chance to be heard (7 NYCRR § 1904.2(l)(2)) and present witnesses (7 NYCRR § 1904.2(l)(5)) and other evidence (7 NYCRR § 1904.2(l)(6)). The inmate may be given an assistant to help him compile this evidence and interview witnesses (7 NYCRR § 1904.2(l)(4)). After such hearing, which will be electronically recorded (7 NYCRR § 1904.2(l)(3)), the TRC will issue its written decision (see Anderson v. Recore, 446 F3d 324, 328-329 [2d Cir 2006]) specifying "the evidence relied on and reasons" for the decision (Greaves v. State of New York, n.o.r., 1997 WL 278109, \*2 [SDNY 1997], citing Wolff v. McDonnell, *supra*, 418 US at 564).

The only time a TRC hearing is not necessary to satisfy due process is when the inmate has already received another hearing about the same underlying charges. This is not an unusual occurrence since the applicable regulations anticipate that some level (tier I, II or III) disciplinary proceeding will precede a TRC review when removal is contemplated because of petitioner's conduct (see, e.g., 7 NYCRR §§ 280.3(b)(4), 1904.2(l)). If petitioner's guilt of the infraction charged is established at such hearing, TRC may decide to remove him from the temporary release program without holding a second hearing (see, e.g., Matter of Hall [Zenzen], 20 AD3d 840, 841 [3d Dept 2005]). However, when, as here, "an inmate has not had a disciplinary hearing sustained ... [TRC] shall conduct a full hearing to ensure that the inmate has been afforded due process" (7 NYCRR § 1904.2(l)).

In connection with such hearing, respondents' own regulations set forth eight things

which must be afforded the inmate to ensure his due process rights: (i) "notice of specific reasons at least 24 hours prior to the [TRC] meeting"; (ii) the choice of making a personal appearance before TRC; (iii) an electronic recording of the entire TRC hearing; (iv) the "opportunity for an inmate to request an inmate assistant"; (v) the "opportunity for the inmate to call witnesses"; (vi) the "opportunity to reply and produce evidence"; (vii) a "written statement setting forth the decision and the evidence relied on"; and (viii) completion of form 4187, which must be kept on file (7 NYCRR §§ 1904.2[1][1]-[8]). These rights are also mandated by federal law (see Morrissey v. Brewer, *supra*, 408 US at 489). Failure to afford the inmate each of these requirements, even when respondents do not appear to have violated the removal procedures set forth in 7 NYCRR § 1904.2, constitutes a violation of the inmate's constitutional due process rights (Matter of Kroemer [Joy], 2 Misc 3d 265 [Sup Ct, Yates Co, 2003]).

Respondents contend that petitioner received a hearing begun on August 25 and "continued" on August 30. The court finds that petitioner was actually given two distinct hearings, which neither jointly nor separately can be said to comport to the specific requirements set forth above.

The August 25 hearing, scheduled upon a referral to TRC to review petitioner's program participation in light of the police complaint filed against him, was conducted without notice to petitioner, although the TRC review form indicates that petitioner waived his right to notice (respondents' exhibit I). Nothing before the court indicates that the hearing was recorded, electronically or otherwise. Petitioner was allowed to testify, but he did not present any witnesses or evidence. Neither is there any indication that petitioner was advised he had the right to introduce evidence, summon witnesses, or request an assistant. TRC's recommendation was to suspend petitioner pending the outcome of the investigation (*ibid.*).

The August 30 hearing, held **after** petitioner had been removed from the temporary release program (see respondents' exhibit J), was also conducted without notice, and this time the TRC review form does not indicate a waiver of notice by petitioner (see respondents' exhibit L). Again, petitioner testified but did not present either witnesses or evidence, and was not advised of his rights in connection with the hearing, including the right to an assistant.

Clearly, more than half of the procedural mandates enumerated above and discussed in detail below were not provided to this petitioner.

A. **Notice.**

The claim that petitioner waived his rights is laughable. There is no indication in the record that he knew what his rights were or that respondents bothered to explain them to him.

Under respondents' regulations, petitioner was entitled to receive at least 24 hour' notice of the specific reasons his continued participation in the temporary release program was being evaluated (7 NYCRR § 1904.2[l][1]). "Failure to give an alleged violator timely written notice of the date, place and time of the hearing ... prior to the scheduled date as required by the statute, renders invalid a purported ... hearing" (cf. People ex rel. Andersen v. New York State Board of Parole, 94 AD2d 807, 808 [2d Dept 1983]; Matter of Lott [Smith], 84 AD2d 909, 910 [4th Dept 1981]). "[T]he fact that petitioner appeared at the hearing does not constitute a waiver of his right to receive the ... notice" (Matter of Amato [New York State Board of Parole], 96 AD2d 1098, 1099 [2d Dept 1983]).

For a waiver of notice to be upheld, there must be "evidence of a knowing and intelligent waiver of this due process right by [petitioner]" (People v. MacNeil, 283 AD2d 835, 836 [3d Dept 2001], citing People v. Neish, 281 AD2d 817 [3d Dept 2001]). Absent an

indication in the record "that there was [a] clear, knowing, informed waiver by petitioner of his right to adequate notice" respondents cannot be said to have complied with their own regulatory mandate (People ex rel. Howser v. New York State Division of Parole, 86 AD2d 831, 831-832 [1st Dept 1982], revd on other grounds 57 NY2d 769 [1982], citing People ex rel. Johnson v. New York State of Parole, 71 AD2d 595 [1st Dept 1979]). An "uninformed and unclear [waiver] must be denied legal effect by this court" (People ex rel. Howser, supra, citing People ex rel. Rivera v. New York State Division of Parole, 83 AD2d 918 [1st Dept 1981]). In the case at bar, there is no evidence that petitioner's waiver of his right to notice was "knowing and voluntary" rather than "elicited in order to conceal error" (contrast People v. Haupt, 16 AD3d 1079 [4th Dept 2005], lv den 5 NY3d 763 [2005]; see also People v. S.G., 4 Misc 3d 563, 567 [Sup Ct, NY Co, Kahn, J, 2004]).

Furthermore, even assuming that petitioner knowingly waived the 24-hour notice that a hearing was going to to be held, it would not change the fact that petitioner was not given due process since he did not have notice of the underlying facts. "The fact that petitioner had **some** notice, rather than none at all, in advance of the ... hearing is irrelevant; the issue is the adequacy of that notice.... because petitioner is entitled to not only **timely** notice, but also **informative** notice, detailing the charges against him" (cf. People ex rel. Levy v. Walters, 87 AD2d 620 [2d Dept 1982], citing People ex rel. Johnson v. New York State of Parole, supra, emphasis in original). Notice which is "insufficient to provide defendant with a meaningful opportunity to respond" is tantamount to no notice (cf. People v. MacNeil, supra, 283 AD2d at 836).

Based on the foregoing, the court finds that petitioner was not afforded adequate notice of either hearing.

**B. Recording.**

Section 1904.2(l)(3) mandates that "[a]n electronic recording of the entire hearing shall be made." Although the August 30 hearing was recorded in accordance with the regulation, there is nothing to suggest that the August 25 hearing was recorded in any way.

**C. Assistance.**

7 NYCRR § 1904.2(l)[4], the regulation applicable to removal from the temporary release program, mandates that there be "[a]n opportunity for an inmate to request an inmate assistant if the inmate is illiterate, the issues are complex or the inmate is 'keeplocked' and unable to prepare a defense." "The complexity of an issue has been defined by the amount of information available to the inmate, and his ability to gather it, i.e., his confinement status and capability to understand the evidence necessary to present his case" (cf. Matter of Kelemen [Coughlin], 128 Misc 2d 190, 193 [Sup Ct, Orleans Co, 1985], analyzing 7 NYCRR § 251-4.1[b]). Clearly, the issues here were complex and petitioner was keeplocked and unable to prepare a defense. An inmate who meets the regulatory criteria is entitled to an assistant (cf. Matter of Cliff [De Celle], 260 AD2d 812, 814 [3d Dept 1999], lv den 93 NY2d 814 [1999]; see also Matter of Alston [Goord], 25 AD3d 852 [3d Dept 2006]). If the assistant assigned to the inmate does an inadequate job, there is a due process violation (cf. Matter of Martin [Coughlin], 90 AD2d 946 [3d Dept 1982], citing 7 NYCRR §§ 253.3[a], [b] and [c] and Matter of Amato [Ward], supra, 41 NY2d at 472-473). Yet, it is undisputed that petitioner was not given the opportunity to request an assistant, or even told he had the right to do so.

**D. Witnesses.**

Section 1904.2(1)(5) requires that there be "[a]n opportunity for the inmate to call witnesses." Respondents do not claim to have afforded petitioner this right to call witnesses at either TRC hearing. As shown by petitioner's submissions in his administrative appeal, there were several witnesses he could have called to testify on his behalf. Even at the August 30 hearing, when petitioner said "I have witnesses that work with me knowing that she calls me and harasses me" (respondents' exhibit F, p 13, ll 13-14), he was not told he could call those witnesses. In fact, later on in that hearing Pittman made it clear that the TRC was only interested in the police report and would not listen to anything petitioner or any other witness had to say: "We can go by this paper. We rather go by this paper and see it in black and white than to go by what somebody else is telling us, you know, verbally, verbalizing to us (id., pp 22-23).

"The right to call witnesses is one guaranteed by due process.... [T]he constitutional right to call witnesses 'is not waivable unless it is shown that the prisoner was informed of its existence and made a knowing and intelligent waiver.' No such showing has been made here" (Matter of Shipman [Coughlin], 98 AD2d 823 [3d Dept 1983], citations omitted). By failing to advise him of the right to call witnesses, respondents breached their own regulations and made it virtually impossible for petitioner to defend himself or even have a meaningful hearing. This is not inconsistent with petitioner's contention that the TRC 'hearing' was a sham because the decision had already been made. The court finds "respondents have impermissibly denied petitioner his right to call a witness in violation of their own regulations.... [R]espondents must have 'a sufficient basis upon which an inmate's conditional right to call witnesses can be summarily denied'" (cf. Matter of Wong [Coughlin], 137 AD2d 272, 273 [3d Dept 1988], citations omitted). The court also questions whether Pittman's presence at the August 30 hearing

as a TRC member was a breach of petitioner's right to a neutral and impartial panel, given her prior knowledge of the facts surrounding the alleged threats and her status as a potential witness for petitioner (see Quartararo v. Hoy, 113 F Supp 2d 405, 414-415 [EDNY 2000]).

**D. Opportunity to reply and produce evidence.**

As discussed above, petitioner was not given notice of the hearing, an assistant or the opportunity to present witnesses. He was allowed to testify, but his testimony was clearly discounted. At the very least, petitioner's denial of wife's hearsay statement in police report -- the only evidence against him -- raised a question of credibility to be resolved by the hearing officer (see Matter of Alston [Goord], *supra*, 25 AD3d at 852-853, citing Matter of Wright [Goord], 19 AD3d 855 [3d Dept 2005], *lv den* 5 NY3d 711 [2005] and Matter of Moore [Goord], 16 AD3d 800 [3d Dept 2005]). The fact that his testimony -- the sole testimony at the hearing -- was not considered at all, is in itself a violation of petitioner's due process rights. "Due process requires, as a general matter, 'an opportunity to be heard at a meaningful time and in a meaningful manner' (cf. Calhoun v. New York State Division of Parole Officers, 999 F2d 647 [2d Cir 1993], citing Mathews v. Eldridge, 424 US 319, 333 [1976]). ~~Petitioner was not given that opportunity.~~

It is evident from the transcript of the August 30 hearing that the only evidence considered by the TRC was the police report, and the evidence they imagined petitioner's wife gave to the police to make them believe her, although in fact they didn't believe her because they never sought to arrest petitioner:

MS. PITMAN: "The fact that she made a report. It's one thing when somebody calls in and says, 'He is doing this, he is doing that to me'.... Then that's just

hearsay. But if somebody actually goes to the precinct and makes a report.... The fact that she went down to the precinct is what we are saying is serious."

MS. PORTER: "It's a very serious thing. She is going to a precinct and she has convinced the police that you made these threats. I mean, in this day and age of domestic violence, she should have had a little bit of evidence, hopefully, she gave the precinct."

(respondents' exhibit F, pp 22-23). In actuality, the police report respondents put so much faith in is not competent evidence.

The unsworn statement of a witness contained in a police report is "hearsay" (Stankowski v. Kim, 286 AD2d 282, 283 [1st Dept 2001]; see also Costa v. 1648 Second Avenue Restaurant Inc., 221 AD2d 299, 300 [1st Dept 1995], citing Flores v. Pharmakitis, 209 AD2d 205, 206 [1st Dept 1994]). A Tier III disciplinary hearing determination was annulled when "the only evidence of a threat or coercion on this record was the hearsay statement ... -- a wholly uncorroborated statement which was directly contradicted by the inmate's testimony. Under these circumstances we conclude that the proof presented was inadequate to support the conclusion that petitioner utilized some type of threat to instill fear" (Matter of Brown [Selsky], 278 AD2d 779, 780 [3d Dept 2000]). While hearsay statements may be admissible at an administrative hearing, these must be at least a modicum of legally admissible evidence to support the agency's determination (See, Leon's Collision Shop v Adduci, 162 AD2d 986 [4<sup>th</sup> Dept 1990], Vincent KK v State of New York Office of Children and Family Services, 284 AD2d 777 [3d Dept 1991]).

Undaunted by the TRC's extraordinary reversal of the law, respondents seem to be saying that they are not required to ascertain the truth of anything or to base their decision to remove petitioner from any program on any evidence. Respondents' documentary evidence

shows that the decision to remove petitioner from the temporary release program was made on August 26, well before Bush's investigation was concluded and the TRC "considered" the matter (see tab 8 to Sumigray affidavit; respondents' exhibit J). Respondents' supporting affidavit states that "DOCS does not and, indeed, cannot stand as arbiter of whether there was any substance to the allegation. It could only take the steps necessary to assure Mrs. Marchiano's safety" (Sumigray affidavit, ¶ 10). So much for truth.

#### E. Meaningful Statement.

Section 1904.2(1)(7) requires a "written statement setting forth the decision and the evidence relied on."

"[W]hen prison officials deprive an inmate of a liberty interest, Due Process requires that 'there must be a written statement by the fact finders as to the evidence relied on and reasons for the disciplinary action.'... This requirement serves to assure that administrators and courts will act fairly and protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding" (Greaves v. State of New York, *supra*, 1997 WL 278109 at \*2, citing Wolff v. McDonnell, *supra*, 418 US at 564).

Here, the only such statement was one line in the August 30 TRC review form:

"program removal based upon the serious nature of police complaint" (respondents' exhibit L).  
"In sum, [respondents] failed to identify the evidence relied upon in making the determination to remove [petitioner] from work release.... [T]here is virtually no evidence supporting or explaining the TRC's recommendation in this record; rather, the TRC report contains only conclusory statements" (Quartararo v. Hoy, *supra*, 113 F Supp 2d at 416, citing Friedl v. City of

New York, supra, 210 F3d at 85).

The November 8, 2005, determination of petitioner's administrative appeal was even less informative. The only explanation provided for the cryptic "Program Part" reason for denying the appeal was that "the serious nature of the police report ... indicates an inability to adhere to temporary release rules and regulations" (Appendix at A-32).

When reviewing termination from temporary release program, "the scope of judicial review is limited to whether respondents violated any statutory requirement or whether respondents' determination was affected by irrationality bordering on impropriety" (Matter of Young [Temporary Release Committee of Albion Correctional Facility], 122 AD2d 606 [4th Dept 1986], lv den 68 NY2d 611 [1986]). As discussed above, respondents deprived petitioners of his due process rights with respect to just about every procedure specified by the regulations, any one of which alone would be grounds to overturn the decision. An agency's disregard of its own regulations is "completely arbitrary" (Lugo v. Gaines, 83 AD2d 542, 543 [1st Dept 1981]).

In view of the foregoing, the court finds respondents' removal of petitioner from the temporary release program to be both irrational and improper.

#### Merit Time

"The merit time allowance, available to certain inmates who have completed various programs, is a credit against the minimum term of a prison sentence in the amount of one sixth of that minimum term (see Correction Law § 803[1][d]). When granted, the effect of this merit time allowance is to accelerate petitioner's initial parole hearing date (see Matter of McKeown [Goord], 284 AD2d 622 [3d Dept 2001]) which could result in petitioner's 'possible release on parole at a date computed by subtracting the merit time allowance from his parole eligibility date' (7 NYCRR § 280.4[a])" (Matter of Erdheim [Dillard], 290 AD2d 642, 643 [3d Dept 2002], lv

den 97 NY2d 612 [2002]; see also 7 NYCRR §§ 280.1, 280.3(b)(4)).

"[D]ue process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits" (Superintendent v. Hill, *supra*, 472 US at 453, citing Wolff v. McDonnell, *supra*).

"Correction Law § 803(1)[a] provides that good time allowances may be withheld for an inmate's 'failure to perform properly in the duties or program assigned'" (Matter of Burke [Goord], 273 AD2d 575 [3d Dept 2000], lv den 95 NY2d 898 [2000]). 7 NYCRR § 280.3(b)(4) provides that "merit time allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary infraction or fails to continue to perform and pursue his or her assigned program plan or earned eligibility plan." This was apparently the justification used by respondents. "DOCS properly revoked petitioner's merit time on the basis of his suspension from the temporary release program because, once [petitioner] was so suspended, he had failed to perform his assigned Program Plan" (Sumigray affidavit, ¶ 8). However, it is undisputed that petitioner's only failure to perform his program stems from his improper removal from temporary release rather than from a dereliction on his part.

"While it is true ... [that] good behavior time is not automatic and must be earned (Correction Law § 803), forfeiture of such credit may follow only after a hearing." Absent such hearing "no circumstances warranting the forfeiture of good time exists" (People ex rel. Laurence [New York State Board of Parole], 68 AD2d 830, 831 [1st Dept 1979], citing (Matter of Amato [Ward], 52 AD2d 945 [2d Dept 1976], *affd* 41 NY2d 469 [1977]; 7 NYCRR § 260.4[b]).

"Revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by **some evidence** in

the record" (Luna v. Pico, 356 F3d 481, 487-488 [2d Cir 2004], citing Superintendent v. Hill, supra, 472 US at 454, emphasis in original). In this context, "some evidence" means "reliable evidence" (Luna v. Pico, supra, 356 F3d at 488). As discussed above, the police report, amounting to nothing more than inadmissible hearsay, was not reliable evidence capable of supporting the actions taken against petitioner.

Petitioner also argues that because he never committed "a serious disciplinary infraction" respondents had no right to revoke his merit-time allowance and rescind his scheduled merit-time release date of August 25, 2005. As was the case with removal from the temporary release program, if the loss of merit time is the result of a sustained disciplinary hearing, a second hearing pursuant to 7 NYCRR part 261 is not required (Matter of Urbina [McGinnis], 270 AD2d 535 [3d Dept 2000]; Matter of Worthy [Selsky], 6 AD3d 840, 841 [3d Dept 2004]). It is significant that respondents "never charged [petitioner] with misbehavior or a violation because of the alleged threats. The investigation into the threats simply appears to have been abandoned" (Quartararo v. Hoy, supra, 113 F Supp 2d at 414). No hearing or counsel were provided to petitioner, and the only opportunity to present evidence afforded to him was through his administrative appeal, which was denied (see Appendix, p A-32).

In addition to the merit time, which is in essence an inchoate right, petitioner earned - and lost -- a certificate of earned eligibility. Under Correction Law § 805, if a certificate of earned eligibility is issued, the inmate "shall be granted parole release at the expiration of his minimum term unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society" (Walters v. Ross, supra, 1992 WL

398307, at \*3; Matter of Romer [Dennison], 24 AD3d 866, 867-868 [3d Dept 2005], lv den 6 NY3d 706 [2006]).

It is from this certificate and Correction Law § 805 that petitioner's liberty interest and due process rights in his merit time emanate. Although "petitioner's ... receipt of a certificate of earned eligibility did not automatically entitle him to discretionary parole release" (Matter of Dorman [New York State Board of Parole], 30 AD3d 880 [3d Dept 2006]), the impact of his having it cannot be underestimated, since that fact alone can make the difference between a grant or denial of parole (see, e.g., Wallman v. Travis, 18 AD3d 304, 306-307 [1st Dept 2005]). In his affidavit opposing this Article 78 proceeding, respondents' merit time administrator brazenly states that once TRC recommended to remove petitioner from the temporary release program, the loss of his merit certificate was automatic (Sumigray affidavit, ¶ 10). While that is certainly the way respondents proceeded against petitioner, that is not the way it is supposed to happen under respondents' own regulations.

Rescission of a scheduled release date is highly regulated. Under 9 NYCRR § 8002.5(b), a senior parole officer who learns of grounds that may cause the parole board to reconsider releasing an inmate on a scheduled merit release date may "temporarily suspend" that date, but if he does so, he must "as soon as practicable, notify the inmate in writing of the suspension" and investigate the attending circumstances. Thereafter, he must "prepare a rescission report delineating the results of said investigation" and submit the report to a member of the parole board, who must then review the report and decide whether to hold the inmate for a rescission hearing or reinstate his scheduled release date. Those are the only two options.

If a rescission hearing is ordered, the inmate is to be afforded certain due process

rights, including the right to counsel (9 NYCRR § 8002.5(b)[5]). After the hearing, the parole board shall reach a decision by majority vote and within 14 days of the hearing provide the inmate and his counsel with a written statement indicating their decision and rationale (9 NYCRR § 8002.5[d]).

Again, despite respondents' contention that everything happened automatically, rescission of a scheduled release date must be supported by evidence. "The Board is empowered to rescind a decision granting an open parole release date when there is substantial evidence that an inmate has committed significant misbehavior[,] including the violation of a prison disciplinary rule" (Matter of Bishop [Smith], 299 AD2d 777, 778 [3d Dept 2002]). Here, the parole board "erred in rescinding [petitioner's] open parole release date because, in doing so, the Board failed to follow its own rules and regulations" (Matter of Blanche [Dennison], 23 AD3d 1074 [4th Dept 2005]).

### Discussion

In the case at bar, petitioner was not convicted of a violent crime, nor does he have a history of violence. Rather, it appears that respondents removed petitioner from the work release program, rescinded his merit release date, and ultimately denied him parole, simply because they feared that if he were to be released this otherwise non-violent person with no history of domestic violence might commit a violent crime against his wife and make them look bad (see TRC hearing transcript, p 18, ll 6-13, at respondents' exhibit F: "sometimes you may do right, you may be set up in all this, but we have to.... Because if the slightest thing happened to her, we are in trouble if we left you in this type of program knowing something"). This fear (not for petitioner's wife, but for their own appearance), was grounded solely on the hearsay of petitioner's estranged wife -- uncorroborated even by her.

Nothing before the court reflects that respondents -- or anyone else -- gave any credence to the allegations of petitioner's wife. Petitioner was not arrested. No misbehavior report was filed against him. No disciplinary proceedings were instituted. Yet, without any regard for petitioner's due process rights or respondents' own regulations, respondents stripped petitioner of every expectation of liberty he had earned, not because there was credible evidence that he had done something wrong but because they feared that "if anything happens to somebody, the question always comes up later, wasn't he supposed to be locked up 24/7"? (TRC hearing transcript, p 24, ll 18-20). Thus, to avoid even the slightest chance of bad press, respondents punished petitioner for a crime he had not yet committed (much like society's solution to the crime problem in Spielberg's 2002 futuristic nightmare, "Minority Report"),<sup>1</sup> and indeed might never commit.

"Pursuant to its own regulations, the TRC was not permitted to consider the best interest of the temporary release program in deciding whether an inmate should be removed. The language simply does not exist in the regulations. Simply put, the TRC was not entitled to remove a participant for self-preservation purposes" (Quartararo v. Hoy, supra, 113 F Supp 2d at 415). Respondents' statutory and regulatory discretionary powers do not allow them to charge, convict and sentence someone who has been assiduously following all their rules and trying to rehabilitate himself, scarcely paying lip service to due process and statutory guidelines, based solely on self interest and an allegation which their own investigation showed could not be substantiated. "The mere potential for an indirect penalty being imposed upon prisoners for

---

<sup>1</sup>See also Kirchmeier, "A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice," 83 Oregon Law Review 631, 714, n 373 [2004]: "One could argue that one of the major justifications for punishment today is similar to the *Minority Report* scenario of punishing people for crimes not yet committed. Today, one of the main justifications for punishment is incapacitation -- or to prevent a criminal from committing future crimes.... Thus, punishments like three-strikes laws with a component of incarcerating criminals because they might commit crimes in the future, arguably are not so far away from the future vision of *Minority Report*."

infractions for which guilt is not established places prisoners in a shockingly unfair status"

(Garrett v. Coughlin, 128 AD2d 210, 213 [3d Dept 1987])

Almost two decades ago, our Chief Judge sagely noted that "law as well as ... public policy ... have as their objectives rehabilitating and reintegrating former inmates in the hope that they will spend their future years productively instead of returning to crime.... [F]undamentally, the underlying premise that, once released, [petitioner] by reason of his past presumptively posed a continuing, foreseeable risk of harm to the community is at odds with the laws and public policy regarding the release of prisoners" (Eiseman v. State of New York, 70 NY2d 175, 191 [1987]).

In the last ten years, however, New York's law on prisoner's rights has changed radically, legislatively, judicially and administratively. The parole board in particular has been the subject of myriad constitutional claims, primarily stemming from the charge that it is implementing by administrative fiat the Governor's oft-touted agenda of eliminating parole for all felons, which is the subject of a pending class action suit by A-1 felons (see Graziano v. Pataki, *supra*, 2006 WL 2023082). The validity of the legislative action taken in furtherance of that policy survived challenge in the state courts (Dorst v. Pataki, 90 NY2d 696, 700 [1997]: "The Legislature is free not only to delegate rulemaking powers to a specialized administrative body appointed by the Governor, but to substitute the Governor for that body"), but is now at issue in the Second Circuit (see Earley v. Murray, 415 F3d 71 [2d Cir, Walker J, 2006]; see also "'Administrative' Addition to Sentence Criticized," NYLJ June 14, 2006 at 1, col 3).

Just this summer, this court was confronted with the current atmosphere of disinterest in the rehabilitation of convicted felons who have paid their dues, and struck by the

inhumanity of the state agents entrusted with the lives and fates of those individuals whom our criminal justice system has rendered powerless and voiceless (see Matter of La Cloche [Daniels], NYLJ June 20, 2006, at 22, col 1 [Sup Ct, NY Co, York, J, 2006]).

In this case, which appears to be one of first impression, respondents have gone far beyond punishing inmates anew for what they have already done and paid for. Spurning the law, the Constitution, and the philosophy of rehabilitation underlying our democratic system of justice, as well as their own regulations, respondents have punished petitioner for a hypothetical violent crime that they fear he might commit in the future unrelated to the non-violent white-collar crimes of which he stands convicted, even though their own investigation showed that there was no evidence on which to base either the fear or the punishment.

It sometimes happens that a felon who serves his time in prison and is apparently rehabilitated will commit a heinous crime after he is released, as was the case in Eiseman v. State of New York, supra). But to pre-punish all inmates, on the assumption that they will commit a crime if they are released is to abandon the goal of redemption and rehabilitation. "New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.... The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender" (Williams v. New York, 337 US 241, 247 [1949]).

As evidenced by the denials of petitioner's administrative appeals cited above, it is clear that his removal from the temporary release program was the spark that set off the chain reaction, and that spark was lit not with a bang but with a whimper: the uncorroborated police report.

"Certainly the state is entitled to a great deal of deference in running its correctional facilities and managing its inmate population.... [b]ut ... the state, in administrating its prisons, [may] not run afoul of the Constitution" (Quartararo v. Hoy, supra, 113 F Supp 2d at 420-421, citing U.S. Constituion, Art VI, cl 2). Petitioner was not arrested nor charged with any misconduct (see, e.g., 7 NYCRR § 270.2[BB][3][i]). He was also not given a full and fair hearing on those possible charges. Nevertheless, he was punished for them, as well as for the future behavior claimed by his wife. The concept is simple -- if respondents believed petitioner had committed a disciplinary infraction, he should have been punished in accordance with the procedures set forth in the regulations (7 NYCRR Subchapter A). If he did not do anything wrong, he should not have been punished at all.

"Based on the substantial due process violations detailed above, the court cannot conclude that the [respondents]' actions were objectively reasonable. Rather, their actions were objectively unreasonable. Not only did the defendants fail to comply with their own regulations governing notice and a statement of reasons -- regulations with which they presumably were familiar -- they failed to provide any due process to this [petitioner]" (Quartararo v. Hoy, supra, 113 F Supp 2d at 416). In short, in effecting petitioner's removal from the temporary release program, which ensued in his loss of merit time and scheduled release date, and inexorably presaged he would not be paroled, respondents deprived petitioner of his liberty interests without due process based solely on the hearsay of his arguably vindictive estranged wife.

### Appropriate Remedy

The only question left to resolve is what petitioner's remedy should be. Petitioner, naturally enough, seeks immediate release. Respondents contend that this court lacks the power to do more than order a new TRC hearing and *de novo* parole consideration (Handerxhanji v. New York State Board of Parole, 97 AD2d 368 [1st Dept 1983] and Bell v. Recore, 276 AD2d 983 [3d Dept 2000]). The appropriate remedy lies in between.

A determination made "in violation of DOCS' own rules and regulations; and ... in violation of lawful procedure' should be annulled (Matter of Nesbitt [Goord], 12 Misc 3d 702 [Sup Ct, Albany Co, Lamont, J, 2006], citations omitted). "[T]he deprivation of [petitioner]'s liberty was directly caused by the constitutional violations. As a result of this determination, the Court shall order that [petitioner] be reinstated to the [temporary release program], with identical restrictions, rules, freedoms and conditions that were applicable to him prior to his removal" from the temporary release program (Quartararo v. Hoy, *supra*, 113 F Supp 2d at 408, 417). Of course, respondents are free to review his continued participation in the program at any time, but may do so only in accordance with this decision and in strict adherence to the applicable laws and regulations (see People ex rel. Aupperlee v. Warden of Wallkill Correctional Facility, 235 AD2d 605, 606 [3d Dept 1997]).

To the extent that respondents violated petitioner's due process rights in taking away his merit time, the court cannot offer him redress. "The effect of a merit time allowance would be to accelerate petitioner's original parole hearing date by subtracting the merit time allowance from his parole eligibility date (see, 7 NYCRR § 280.4). Inasmuch as petitioner has appeared before the Board of Parole subsequent to the commencement of this proceeding ... the matter is ...

moot" (Matter of McKeown [Goord], *supra*, 284 AD2d 622; see generally, Matter of Adams [New York State Division of Parole], 297 AD2d 621 [3d Dept 2000]).

However, respondents' "automatic" rescission of petitioner's scheduled release date is hereby annulled. The parole board, if it wishes, may revisit the matter without considering petitioner's removal from the temporary release program, through a hearing in strict accordance with the regulations (see Matter of Blanche [Travis], 306 AD2d 888, 889 [4th Dept 2003]). To the extent that petitioner seeks restoration of his scheduled August 31, 2005 merit-time early release date abrogated by respondents, that relief is moot, since that date has passed.

Nonetheless, petitioner should not have to wait until May 2007 for his next appearance before the parole board, since the parole board rendered its decision based on a faulty premise and thus deprived petitioner of fair consideration. Thus, respondents shall restore petitioner's rescinded release date to the extent of setting the earliest possible date for his next appearance before the parole board, which shall consider petitioner with all the favorable intendments of Correction Law § 805.

(1) it is **ORDERED** and **ADJUDGED** that: this Article 78 proceeding is granted to the extent set forth above and otherwise denied.

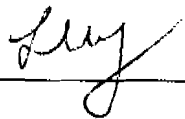
(2) the court will retain jurisdiction over this proceeding, pending respondents' decisions after the hearing ordered herein;

(3) thereafter, either party may move by order to show cause for further relief consistent with this decision.

(4) the two hearings removing petitioner from the Temporary Work Release Program and his certificate of Earned Eligibility and his Merit Time Parole date are annulled;

(5) respondents shall schedule a Parole Hearing for petitioner within ten (10) days of the service of a copy of this Order and Judgment with Notice of Entry and include in a Notice of the Hearing the notice of petitioner's rights in accordance with its regulations as discussed in the body of this Order and Judgment.

DATED: September 8, 2006

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).