

Matter of Barto v New York State Div. of Parole
2007 NY Slip Op 33015(U)
September 24, 2007
Supreme Court, Albany County
Docket Number: 0087707/2007
Judge: George B. Ceresia
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CPLR Article 78 proceeding to review a determination of the respondent dated September 26, 2006 in which the petitioner was denied release on parole. The respondent made a motion to dismiss the petition on grounds that the petitioner failed to exhaust his administrative remedies, and that his claims are moot. In support of the motion, the respondent submitted the affidavit of Carolyn Buckner, a secretary employed in the New York State Division of Parole. In her affidavit, Ms. Buckner indicated that on October 2, 2006 the respondent received a notice of administrative appeal with respect to the September 26, 2006 parole denial, but that as of March 28, 2007 the appeal had not been perfected, and that an extension had not been requested.

With respect to the alleged failure of the petitioner to exhaust its administrative remedies, “it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375). “This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its ‘expertise and judgement’” (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher

[Levine], 36 NY2d, 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). This principle has been applied with consistency in dealing with administrative determinations involving inmates (see, Matter of Hakeem v Wong, 223 AD2d 765, 765 [3rd Dept., 1996]; Matter of Banks v Recore, 245 AD2d 906, 907 [3rd Dept., 1997]; People ex rel. King v Lacy, 252 AD2d 701, 701-702 [3rd Dept., 1998]; Matter of Archie Clarke v Senkowski, 255 AD2d 848, 849 [3rd Dept., 1998]). As stated in Watergate v Buffalo Sewer (supra), the exhaustion rule need not be followed in certain limited circumstances, such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (see, id.). The petitioner, in opposition to the motion, argues that the matter is not moot, and that the pursuit of an administrative remedy would be futile and/or cause him irreparable injury.

Before addressing the issues of exhaustion of remedies and mootness, a brief review of the history of this proceeding is necessary.

The petitioner was initially denied parole release in a determination dated October 18, 2005. He subsequently commenced a CPLR Article 78 proceeding (Proceeding No. 1) to review that determination. One of the grounds which served as a basis for that proceeding was petitioner's claim that the Parole Board had failed to review the minutes of petitioner's sentencing. The respondent thereafter administratively granted him a *de novo* parole interview which was held on September 26, 2006. Because the respondent had

administratively granted the *de novo* parole interview, the respondent made a motion to dismiss Proceeding No. 1 on grounds that the proceeding was moot. In a decision and order dated December 19, 2006 Acting Supreme Court Justice Judith A. Hard denied the motion to dismiss. Justice Hard noted that the respondent had not disputed the petitioner's claims that the respondent had failed to consider his sentencing minutes in either the October 18, 2005 parole determination or the September 26, 2006 parole determination. Justice Hard, citing Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]), noted that there was an exception to the mootness doctrine where a substantial issue continues to evade review. She accordingly found that the issue was not moot, denied the motion to dismiss, and directed the respondent to serve an answer to the petition (which respondent apparently did). In a letter decision, order and judgment dated March 16, 2007, Justice Hard commented that the respondent had, by then, obtained the sentencing minutes and was now consenting to a second *de novo* hearing. She directed that a *de novo* hearing be conducted within forty five days thereof, which would have expired on April 30, 2007¹. The instant proceeding (Proceeding No. 2) was commenced, as noted, seeking review of the September 26, 2006 parole denial.

By order dated June 28, 2007 the Court directed the respondent to advise the Court with regard to whether or not the petitioner had received a *de novo* parole interview and whether the minutes of petitioner's sentencing had been considered in the parole interview.

¹In the same decision, Justice Hard noted that the respondent had now obtained the sentencing minutes.

The respondent has submitted an affidavit which indicates that a de novo parole interview was conducted on April 24, 2007. A copy of the transcript of the parole interview, which is annexed to the affidavit, reveals that the parole board did consider petitioner's sentencing minutes. Under the circumstances, the Court finds that the instant proceeding is now moot.

The Court additionally finds that the exceptions to the exhaustion of remedies doctrine set forth in Watergate v Buffalo Sewer (supra) do not apply, and that therefore the petitioner failed to exhaust his administrative remedies at the time the instant proceeding was commenced

The Court concludes that the respondent's motion to dismiss must be granted on both grounds and the petition must be dismissed.

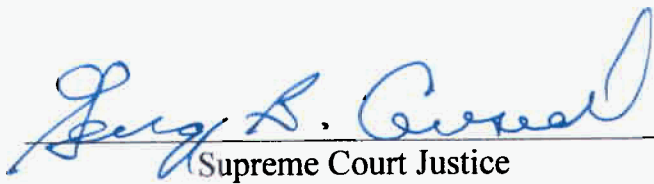
Accordingly, it is

ORDERED, that respondents' motion to dismiss be and hereby is granted; and it is **ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: September 24, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 1, 2007, Petition Supporting Papers and Exhibits
2. Notice of Motion dated March 29, 2007
3. Affidavit of Carolyn Buckner, sworn to March 28, 2007
4. Petitioner's Affirmation in Opposition to Cross Motion filed April 18, 2007
5. Petitioner's Verified Reply To Decision/Order of June 28, 2007
6. Affidavit of Robin Filmer, sworn to July 5, 2007