

Matter of Fleming v Bisceglia

2007 NY Slip Op 33787(U)

October 23, 2007

Supreme Court, Essex County

Docket Number: 0000657/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ESSEX
X

In the Matter of the Application of
ISMAIL FLEMING, #07-A-3447,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

LEO BISCEGLIA, Superintendent,
Adirondack Correctional Facility,
NYS DEPARTMENT OF CORRECTIONAL SERVICES,
and **NEW YORK STATE DIVISION OF PAROLE,**
Respondents.

**DECISION, ORDER AND
JUDGMENT**
RJI #15-1-2007-0250.05
Index #657-07
ORI #NY015015J

X

This proceeding was commenced in Bronx County by the *pro se* Petition for a Writ of Habeas Corpus of Ismail Fleming, verified on June 7, 2007. By Order dated July 18, 2007, the Supreme Court, Bronx County (Hon. E. Greenberg) directed that venue be transferred to Essex County. The papers originally filed in Bronx County were received in the Essex County Clerk's office on August 2, 2007. On August 7, 2007, however, the Amended Petition for Writ of Habeas Corpus of Elon Harpaz, Esq., The Legal Aid Society, Parole Revocation Defense Unit, on behalf of Ismail Fleming, was filed in the Essex County Clerk's office. Ismail Fleming will hereinafter be referred to as the petitioner. The petitioner, who is an inmate at the Adirondack Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Correctional Services. More specifically, the petitioner cited 9 NYCRR §8002.6(b)(1) and argued that the 16-month delinquent time assessment imposed following his final parole revocation hearing on March 28, 2007, commenced running on February 26,

2004, when the parole violation warrant was lodged against him in South Carolina, and had thus long since expired. The Court issued an Order to Show Cause on August 28, 2007. As part of that Order to Show Cause, however, the Court directed that this proceeding be converted into a proceeding for judgment pursuant to Article 78 of the CPLR. In this regard the Court found, in relevant part, as follows:

“Even if the petitioner were to persuade the Court that the 16-month delinquent time assessment had, in fact, expired, such expiration would not entitle petitioner to immediate release from DOCS custody. ‘A *time assessment* is a period of time which is fixed as a result of a final parole revocation hearing and which determines a date by which time the parole violator will be eligible for re-release.’ 9 NYCRR §8002.6(a) (emphasis in original). The expiration of the delinquent time assessment, therefore, only entitles the parole violator to have his or her eligibility for re-release considered pursuant to the provisions of 9 NYCRR §8002.6(c) and (d). *See People ex rel Leggett v. Leonardo*, 274 AD2d 699.”

The Court has since received and reviewed respondents’ Notice of Motion to Dismiss, supported by the Affirmation Robert C. Glennon, Esq., Assistant Attorney General, dated September 21, 2007. The court has also received and reviewed the “AFFIRMATION IN REPLY” of Kerry Elgarten, Esq., The Legal Aid Society, Parole Revocation Defense Unit, submitted on behalf of the petitioner and filed in the Essex County Clerk’s office on October 5, 2007.

At petitioner’s March 28, 2007, final parole revocation hearing the Administrative Law Judge (ALJ) initially expressed his concern that a proposed 16-month delinquent time assessment would run from February 26, 2004, the date the parole violation warrant was lodged against the petitioner in South Carolina. The Administrative Law Judge clearly stated that he did not wish to impose a delinquent time assessment that had already run its course. The parole revocation specialist responded by asserting, in effect,

that the delinquent time assessment would run from March 1, 2007, the date petitioner was returned to the State of New York. The Administrative Law Judge ultimately imposed the 16-month delinquent time assessment and estimated that the time assessment would expire on July 1, 2008 (16 months after petitioner was returned to New York State on March 1, 2007).

The respondents' motion papers tacitly concede that a delinquent time assessment shall be computed as running from the date the parole violation warrant was lodged. They assert, however, that on an undetermined date in late May of 2007, Chief Administrative Law Judge Terry Saunders took action to "correct the error" of the original Administrative Law Judge by amending the Parole Revocation Decision Notice to show a 52-month delinquent time assessment estimated to expire on June 26, 2008 (52 months after the parole violation warrant was lodged against the petitioner in South Carolina in February 26, 2004). While defending the respondent Division of Parole's authority to take such corrective action, counsel for the respondents noted that apparently neither the petitioner nor his counsel were advised of the Chief Administrative Law Judge's action. Accordingly, at the request of Assistant Attorney General Glennon, the respondent Division of Parole consented to the entry of an order of this Court directing that the petitioner be immediately considered for re-release to parole supervision pursuant to the provisions of 9 NYCRR §8002.6(c) and (d). According to counsel for the respondents, "[a]s this Court recognized in its August 28, 2007, Order to Show Cause, re-release consideration is the relief to which Petitioner would be entitled had a 16 month delinquent time assessment commenced on February 26, 2004. Respondents therefore also respectfully request this proceeding be dismissed as moot."

In his Reply Affirmation Attorney Elgarten clearly states that he does not concur with the assertion that the respondent Division of Parole was possessed of the authority to make unilateral changes in the previously issued Parole Revocation Decision Notice. “Nevertheless,” Attorney Elgarten goes on, “[b]ecause respondent ultimately requests (on grounds different than those raised in the petition) this Court to issue an order that petitioner now be considered for re-release, the same relief sought by petitioner, and such order would render the petition moot, petitioner does not oppose the relief sought by respondent.”

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

ORDERED, that the respondent shall immediately either re-release petitioner to parole supervision or consider the petitioner’s re-release to parole supervision pursuant to the provisions of 9 NYCRR §8002.6(c) and (d); and it is further

ORDERED, that the respondents’ motion to dismiss the petition as moot is granted; and it is further

ORDERED AND ADJUDGED, that the petition is dismissed as moot.

Dated: October 23 , 2007, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice