

Matter of Graham v Dennison
2007 NY Slip Op 33827(U)
November 28, 2007
Supreme Court, Albany County
Docket Number: 0526507/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of the Application of
CHARLES GRAHAM

Petitioner,

-against-

ROBERT DENNISON, Chair,
New York State Division of Parole,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #01-07-ST7947 Index No. 5265-07

Appearances: Charles Graham
Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, a former state prison inmate¹, commenced the instant CPLR Article 78 proceeding to review a determination made on March 7, 2007 which revoked his parole.

On April 8, 2005 the petitioner was sentenced to a term of two to four years on a conviction of criminal sale of a controlled substance fifth degree. He was released to parole supervision on July 24, 2006. He allegedly violated the conditions of parole, and on November 6, 2006 his parole status was “revoked and restored” to the Willard Drug Treatment Program. Shortly after the petitioner arrived at the Willard Campus, on January 10, 2007, he indicated that he no longer wished to participate in the program. On the same day, the petitioner was involved in a physical altercation with a Corrections Officer. As a result of this altercation he was cited for a parole violation, and was thereafter arrested pursuant to a parole warrant. On March 7, 2007 a final parole revocation hearing was held before an Administrative Law Judge. At the conclusion of the hearing the petitioner was found guilty of violating the conditions of his release and was returned to the Department of Correctional Services to fulfill the remainder of his sentence.

On April 2, 2007 the petitioner filed an administrative appeal, challenging the revocation of his parole. He filed an amended appeal on May 22, 2007, which he supplemented on June 13, 2007. No decision with regard to petitioner’s administrative appeal had been rendered at the time the petitioner commenced the instant proceeding. Respondent has served an answer containing an objection in point of law which asserts that

¹According to Department of Correctional Services records, the petitioner was conditionally released on October 2, 2007.

the petitioner failed to exhaust his administrative remedies.

“It is well settled that administrative remedies must be exhausted prior to judicial review of any alleged error in the parole revocation process.” (People ex re. Webster v Travis, 277 AD2d 546 [3d Dept., 2000], citing People ex rel. Gaito v Couture, 268 AD2d 914, lv denied 94 NY2d 765 and People ex rel. Davis v New York State Bd. of Parole, 263 AD2d 706, lv denied 93 NY2d 819). However, as stated in 9 NYCRR §8006.4(c):

“[s]hould the appeals unit fail to issue its findings and recommendation within four months of the date that the perfected appeal was received, the appellant 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.”

As noted, petitioner’s amended appeal was filed on May 22, 2007, and a supplement was filed on June 13, 2007. The Court finds that the administrative appeal was perfected on June 13, 2007, and that petitioner’s administrative remedies were not deemed exhausted until October 13, 2007 (see 9 NYCRR § 8006.4 [c]).

The petition in this instance was filed on July 9, 2007. The order to show cause was signed on July 24, 2007, and filed on August 2, 2007. It therefore appears that the petition was premature in that the petitioner had not yet exhausted his administrative remedies.

Even if the appeals unit had rendered a decision subsequent to the commencement of the instant CPLR Article 78 proceeding, this would not excuse the petitioner’s failure to exhaust his administrative remedies. The fact that an administrative appeal is perfected,

or even decided, after commencement of the CPLR Article 78 proceeding does not operate to retroactively validate the petition (see Matter of Boddie v New York State Division of Parole, 293 AD2d 884 [3d Dept., 2002]; Matter of Robinson v Bennett, 300 AD3d 715 [3d Dept., 2002]; People ex rel. Howe v Travis, 18 AD3d 1052 [3d Dept., 2005]; Matter of West v McGinnis, 4 AD3d 654 [3d Dept., 2004]).

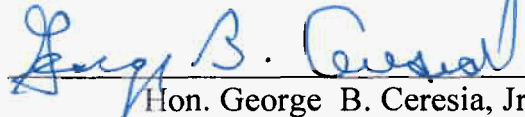
The Court concludes that the petition must be dismissed by reason of petitioner's failure to exhaust his administrative remedies prior to commencement of the instant proceeding (see People ex rel. Carroll v Russi, 232 AD2d 692, [3rd Dept., 1996; People of the State of New York ex rel. Webster v Travis, 277 AD2d 546 [3rd Dept., 2000]).

Accordingly, it is

ORDERED and ADJUDGED, that the petition be hereby dismissed.

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

Dated: November 28, 2007
Troy, New York



Hon. George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Petitioner's Order to Show Cause dated July 24, 2007, Petition, Supporting Papers and Exhibits.
2. Respondent's Answer, Affirmation, Supporting Papers and Exhibits
3. Traverse To the Attorney General dated August 31, 2007