

Matter of Oberoi v Alexander

2008 NY Slip Op 31876(U)

June 30, 2008

Supreme Court, Franklin County

Docket Number: 0001536/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
GURPREET OBEROI, #04-A-4547,
Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**

RJI #16-1-2007-0556.121

INDEX # 2007-1536

ORI #NY016015J

-against-

GEORGE ALEXANDER, Chairman,
New York State Division of Parole,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR, in the nature of mandamus to compel, that was originated by the petition of Gurpreet Oberoi, verified on October 28, 2007, and stamped as filed in the Franklin County Clerk's office on October 30, 2007. Petitioner, who is an inmate at the Bare Hill Correctional Facility, seeks an order of this Court directing the respondent to prescribe by rule the form for a petition to be submitted to request a declaratory ruling pursuant to §204 of the State Administrative Procedure Act (SAPA) and, in addition, directing the respondent to prescribe by rule the procedure for the submission, consideration and disposition of such a petition. The petitioner also seeks an order of this Court directing the respondent to promulgate rules, regulations and/or procedures, pursuant to §501 of the SAPA, by which he may request to have counsel present at his "parole hearing." The Court issued an Order to Show Cause on November 15, 2007, and has received and reviewed respondent's Answer and Return, verified on December 28, 2007, as well as respondent's Letter Memorandum of December 28, 2007. In addition, the Court has received and

reviewed the Affirmation of Terrence X. Tracy, Counsel, New York State Division of Parole, dated December 28, 2007, and filed in the Franklin County Clerk's office on behalf of the respondent on January 3, 2008. The Court has also received and reviewed petitioner's Reply, Memorandum of Law in Support of Reply, Demand for Jury Trial, List of Prospective Witnesses, motion to compel the attendance of Gurpreet Oberoi at trial, and six proposed subpoenas to secure the presence of prospective witnesses at trial, all filed in the Franklin County Clerk's office on January 16, 2008. In addition, on January 23, 2008, the petitioner filed motion papers, returnable February 11, 2008, seeking a Court order compelling the production of papers pursuant to CPLR §409(a). Additional correspondence from counsel for the respondent, dated February 4, 2008, was received directly in chambers on February 6, 2008. Additional correspondence from the petitioner, dated February 7, 2008, was filed in the Franklin County Clerk's office on February 11, 2008.

Except for the purposes of SAPA Article Two, the New York State Division of Parole is specifically excluded from the definition of an "Agency" set forth in SAPA §102(1). It is clear, therefore, that SAPA §501 (as set forth in SAPA Article 5) is not applicable to the Division of Parole since the division is not an "Agency" for the purpose of that statute.

The Division, on the other hand, clearly is an "Agency" for the purposes SAPA §204, which appears in SAPA Article Two.

SAPA §204(1) provides, in relevant part, as follows:

"On petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability, to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should

be taken pursuant to a rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition . . .” (Emphasis added).

In this proceeding the petitioner seeks an order of the Court directing the New York State Division of Parole to adopt rules/regulations in accordance with the above-quoted provisions of SAPA §204(1). The respondent concedes that no such rule/regulations have been adopted to date. Nevertheless, the respondent asserts that the petitioner has not demonstrated that he has been injured in any way by the failure of the division to promulgate SAPA §204 rules/regulations and, therefore, lacks standing to challenge such failure.

In order to establish standing an individual seeking to challenge governmental action or, as in this case, governmental inaction, must show “. . . injury in fact,’ meaning that plaintiff will actually be harmed by the challenged administrative action [inaction]. As the term itself implies, the injury must be more than conjectural.” *New York State Association of Nurse Anesthetists v. Novello*, 2 NY3d 207, 211 (citations omitted). If the harm is not actual and present, it must be shown that such harm is “reasonably certain” to occur if the challenged governmental action/inaction is permitted to continue. *Police Benevolent Association of New York State Trooper, Inc. v. Division of New York State Police*, 29 AD3d 68, 70 (citations omitted). The burden of establishing standing to challenge governmental action falls upon the party initiating such challenge, in this case the petitioner. *See Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d 761 at 769.

Quoting *City of New York v. New York State Department of Health*, 164 Misc. 2d 247, the respondent asserts that the Division of Parole’s “. . . substantive authority to

issue declaratory rulings derives from an affirmative grant of power under State Administrative Procedure Act §204. It is not diminished by its obligation thereunder to promulgate procedural rules for the manner in which such authority is to be exercised.” *Id.* at 252. Thus, according to the respondent, “[p]etitioner is free to submit his petition for a declaratory ruling whether or not the procedural regulations are in place, and the Division is fully authorized by [SAPA] §204 either to issue the ruling or a statement declining to do so.” The Court agrees.

The petitioner alleges that he sought an SAPA declaratory ruling from the Division of Parole by letter to the respondent dated September 4, 2007. In response thereto the respondent has submitted the affidavit of Cherri N. Carty, Confidential Secretary to the respondent Chairman Alexander, sworn to on December 17, 2007. In her affidavit Ms. Carty avers that she reviewed both of the correspondence logs she maintained during the month of September, 2007, but there was “. . . no record of anything sent from Mr. Oberoi.” Although there is clearly a factual dispute as to whether or not the petitioner actually sought a declaratory ruling from the Division of Parole, the Court ultimately finds that no hearing on this issue is required (CPLR §409(b)) since its resolution is ultimately not relevant to the disposition of this proceeding. While it is clear that the division of Parole never responded to petitioner’s letter of September 4, 2007, there are no allegations in the petition or evidence in the record that such non-response was related to the division’s failure to promulgate rules/regulations implementing SAPA §204(1).

The petitioner is free to petition the Division of Parole for a declaratory ruling pursuant to SAPA §204 and the Division is free to either issue a declaratory ruling in

response thereto or a statement declining to issue a declaratory ruling. *See* SAPA §204(2)(a). If, in the process of seeking a declaratory ruling, the petitioner suffers an actual, as opposed to conjectural, injury as a result of the division's failure to adopt rules/regulations implementing SAPA §204, he may at that juncture seek judicial relief anew.

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

ORDERED, that all motions currently pending before the Court are denied; and it is further

ADJUDGED, that the petition is dismissed for lack of standing.

Dated: June 30 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice