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| Matter of Minus v Joy |
| 2008 NY Slip Op 32358(U) |
| August 19, 2008 |
| Supreme Court, Clinton County |
| Docket Number: |
| Judge: S. Peter Feldstein |
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

X

In the Matter of the Application of
OMAR MINUS, #05-R-3056,

Petitioner,

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

-against-

**DECISION AND JUDGMENT
RJI #09-1-2008-0139.11
INDEX # 08-0413
ORI #NY009013J**

DEBRA JOY, Director of Temporary
Release Programs,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Omar Minus, verified on March 7, 2008, and stamped as filed in the Clinton County Clerk's office on March 14, 2008. Petitioner, who is an inmate at the Lyon Mountain Correctional Facility, is challenging the denial of his application to participate in the DOCS temporary release program (industrial training leave). The Court issued an Order to Show Cause on March 19, 2008, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 2, 2008, as well as respondent's Letter Memorandum of May 2, 2008. The Court has also received and reviewed petitioner's Reply thereto filed in the Clinton County Clerk's office on May 20, 2008.

On June 24, 2005, the petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to concurrent, indeterminate sentences of imprisonment of 5 to 10 years each upon his convictions of the crimes of Criminal Sale of a Controlled Substance 3° and Criminal Possession of a Controlled Substance 3°.

While confined at the Lyon Mountain Correctional Facility the petitioner submitted an application (200710267) to participate in the DOCS temporary release program (industrial training leave). The petitioner's application was approved at the facility level but disapproved by the Central Office Reviewer based upon the nature of the crime underlying petitioner's incarceration, his recidivist history and other factors. The comments of the Central Office Reviewer in connection with the industrial training leave denial determination were as follows:

“THE INMATE’S PRESENT OFFENSE IS CSCS 3 & CPCS 3, THIS IS HIS 2ND STATE TERM. THIS OFFENSE INVOLVED THE IN CONCERT SALE OF CRACK. HIS LEGAL HISTORY INCLUDES AN ORDER OF PROTECTION ON FILE THAT RESULTED FROM A CRIMINAL CONTEMPT 2 CONVICTIONS, 2 FELONY CONVICTIONS AND 3 MISDEMEANORS CONVICTIONS. NOTED IS HIS IMPROVED DISCIPLINARY RECORD. HOWEVER, HIS INABILITY TO LIVE A CRIME FREE LIFESTYLE RENDERS HIM AN UNSUITABLE CANDIDATE FOR INDUSTRIAL TRAINING LEAVE.

YOU [PETITIONER] MAY REAPPLY FOR INDUSTRIAL TRAINING LEAVE AFTER 12/2009.”

Upon administrative appeal the industrial training leave denial determination of the Central Office Reviewer was affirmed by the respondent Joy. This proceeding ensued.

Industrial Training Leave is a DOCS temporary release program defined in Correction Law §851(8) as “. . . a privilege granted to an eligible inmate to leave the premises of an institution for a period not exceeding fourteen hours in any day for the purpose in participating in an industrial training program, or for any matter necessary to the furtherance of any such purposes.” It is not disputed that the petitioner is an “eligible inmate” within the meaning of Correction Law §851(2) and was therefore entitled to apply to participate in the DOCS temporary release program (industrial training leave). See

Correction Law §855(2). Correction Law §855(4) provides that “[i]f the temporary release committee determines that a temporary release program for the applicant is consistent with the safety of the community and the welfare of the applicant, and is consistent with rules and regulations of the department, the committee, with the assistance of the of employees or unit designated by the commissioner...shall develop a suitable program of temporary release for the applicant.” DOCS regulations, in turn, have established a relatively complex, eleven item point scoring system to initially evaluate applications for temporary release. Six of the eleven point scoring items are based on criminal history and the remaining five on the applicant’s behavior while in DOCS custody. *See* 7 NYCRR §1900.4(e). The petitioner scored 49 on the DOCS system, which was sufficient for his application to be referred to the TRC for disposition.

7 NYCRR §1900.4(l)(2) directs the TRC, in making a temporary release decision, to center its attention on the applicant’s point score, their interview with the applicant, “and other methods” of evaluation, including recommendations of professional staff. The regulation directs that the committee also take into account any factors which they find to be significant. “In general, the applicant’s ability to profit from participation in temporary release should be weighed against whatever risk to the community or the program would be posed by his release.” 7 NYCRR §1900.4(l)(2). The TAC is enjoined by regulation to “. . . pay careful attention to the circumstance surrounding the offense [underlying the applicant’s incarceration] to determine as accurately as possible the nature of the offense.” 7 NYCRR §1900.4(l)(3). “Inmates should be denied temporary release if their presence in the community . . . would pose an unwarranted threat to . . . public safety . . .” 7 NYCRR §1900.4(l)(4).

An inmate's participation in a DOCS temporary release program is a privilege, not a right. *See* Correction Law §855(9). As such, a Court's review of a decision denying an inmates's application to participate in such program is limited to the consideration of whether the denial determination violated any positive statutory requirement or constitutional right of the inmate and/or whether the denial determination was affected by irrationality bordering on impropriety. *See Peck v. Maczek*, 38 AD3d 948, *Crispino v. Goord*, 30 AD3d 874 and *Greig v. Joy*, 21 AD3d 615.

The Court initially finds no statutory or constitutional violations associated with the industrial training leave denial determination. Although the petitioner claims that the denial determination was marred by a variety of regulatory/statutory violations, none of these claims stand up under judicial scrutiny. As noted previously, there is no dispute that petitioner is an "eligible inmate" within the meaning of Correction Law §851(2). The petitioner asserts, however, that upon his attaining statutory eligibility DOCS officials were obligated to enroll him in the industrial training leave program. Thus, according to the petitioner, the denial determination represented a failure on the part of DOCS to perform a duty enjoined upon it by law. Correction Law §855(2), however, makes clear that the attainment of "eligible inmate" status only entitles an inmate to apply to the TRC for an industrial training leave. Thus the petitioner, although statutorily an "eligible inmate" for temporary release purposes, was still subject to the DOCS administrative review process in order for a determination to be reached as to whether or not he should ultimately be granted an industrial training leave.

The Court finds nothing in the provisions of 7 NYCRR §3.20 which required the respondent to grant petitioner an industrial training leave. The regulatory provision in

question merely identifies the “rehabilitation of inmates” as one of numerous factors that must generally be considered by DOCS employees when exercising discretion as permitted in departmental regulations. Section 3.20 in no way, however, mandates that every DOCS rehabilitative program, including an industrial training leave, be made available to every DOCS inmate regardless of other relevant considerations. A discretionary balancing of community safety concerns with the welfare of the inmate is statutorily required in connection with temporary release determinations. *See* Correction Law §855(4). *See* also 7 NYCRR §1900.4(l)(2), which provides in the last sentence thereof that “[i]n general, the applicant’s ability to profit from participation in temporary release should be weighed against whatever risk to the community or to the program would be posed by his release.”

The Court also finds that the industrial training leave denial determination did not violate the provisions of 7 NYCRR §7.3. That regulatory provision merely describes, in general fashion, DOCS policy *vis a vis* non-discrimination against individuals “. . . identified or suspected of being identified as having AIDS, HIV infection, or HIV-related illness.” Nothing in the record before the Court in this proceeding, however, suggests that the petitioner is afflicted with AIDS, HIV infection or HIV-related illness.

The Court next finds the mere fact that an inmate’s criminal history does not render him or her administratively ineligible for temporary release consideration (7 NYCRR §1900.4(c)(1)(ii) and 1900.4(c)(2)(i) and (ii)) does not mandate that such inmate ultimately be granted temporary release. An inmate who meets the above-referenced administrative eligibility guidelines is merely entitled under DOCS regulations to an interview for the purposes of determining his or her temporary release score pursuant to

7 NYCRR §1900.4(e). *See* 7 NYCRR §1900.4(d). *See also* *Quartararo v. New York State Department of Correctional Services*, 222 AD2d 758.

Finally, the Court finds no statutorily/regulatory basis for the direct referral of petitioner's industrial training leave application to the DOCS commissioner or for petitioner to take an administrative appeal from the ultimate denial of such application to the commissioner. The facility-level approval of petitioner's application for an industrial training leave was apparently forwarded to the DOCS central office pursuant to 7 NYCRR §1900.4(n)(4)(iv). Had the central office concurred with the facility-level determination, direct final review by the DOCS commissioner would have been required pursuant to 7 NYCRR §1900.5(a). Since the Central Office Reviewer in the case at bar, however, disapproved petitioner's industrial training leave application, no direct referral to the DOCS commissioner was required and the Central Office Reviewer's disapproval determination was subject to administrative appeal in accordance with departmental regulations. *See* 7 NYCRR §1900.5(c). Pursuant to the provisions of 7 NYCRR §1900.6, governing the administrative appeals process, the industrial training leave denial determination of the Central Office Reviewer was subject to reconsideration by the director of temporary release programs. 7 NYCRR §1900.6(c). No subsequent administrative appeal to the DOCS commissioner, however, is provided for.

Having found no statutory, regulatory and/or constitutional violations associated with the industrial training leave denial determination, the Court further finds no irrationality bordering on impropriety in the determination of the Central Office Reviewer, as affirmed by the respondent Joy, to deny petitioner's industrial training leave application based upon the nature of the crimes underlying his current incarceration and

recidivist history, notwithstanding petitioner's improved disciplinary record. *See Peck v. Maczek*, 38 AD3d 948, *Abascal v. Roach*, 22 AD3d 995 and *Patterson v. Goord*, 1 AD3d 845.

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

ADJUDGED, that the petition is dismissed.

Dated: August 19 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice