STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
TERRY SIMMONS,

Petitioner,

-against-

DEBRA JOY,

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 # 01-08-ST8729 Index No. 876-08

Appearances: Terry Simmons
Inmate No. 07-R-1347
Petitioner, Pro Se
Livingston Correctional Facility
P.O. Box 49
36 Sonyea Road
Sonyea, NY 14556

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Attorney General
State of New York
Attorney For Respondent
The Capitol
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(Dean J. Higgins,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Livingston Correctional Facility, applied for participation in the Comprehensive Alcohol and Substance Abuse Treatment ("CASAT") program while

at Marcy Correctional Facility. The application was approved on June 14, 2007. In a determination of the Temporary Release Reviewer dated June 22, 2007 the application was denied. The determination of the Temporary Release Reviewer was affirmed by the respondent on September 24, 2007. The petitioner has commenced the above-captioned CPLR Article 78 proceeding seek review of the determination to deny him participation in the Temporary Release Program.

The petitioner argues that the Central Office Review Committee ("CORC") was "merely paying lip service" to the provisions of Corrections Law§ 855, since his crimes of assault in the third degree and criminal possession of a weapon in the fourth degree do not statutorily bar his participation in CASAT. He indicates that his current commitment is for sale of crack cocaine, a non-violent crime, which also does not bar his participation in the CASAT program. He argues that to hold his past against him without giving him an opportunity to address his drug addiction, based partially upon his recidivism is arbitrary and capricious. He admits his drug addiction which, he indicates, lead to a life of crime, but maintains that when he reached out for help (to the respondent) it was denied. The petitioner points out that he is enrolled in the Electrical Trades program and he expects to earn his GED in March 2008. He contends that he has been denied a positive statutory right. He essentially argues that because he is eligible to participate in the program under the provisions of the rules of the temporary release program (see 7 NYCRR 1900.4) this confers upon him a right to participate (since his crime of commitment does not preclude participation). He maintains that by reason of his good program adjustment, his non-violent

crime of commitment, and his acceptable disciplinary record that there is nothing to support the respondent's determination. In his view, he is the perfect candidate for temporary release. He also argues that his admission to CASAT program was court-ordered.

The decision of the Superintendent recites, in part, as follows:

> "This is to advise you that the temporary release application for the above individual has not been approved by the Central Officer Reviewer for the following reasons: I/O Nature, Recdvst Hst, Other.
>
> "Reviewer's Comments:
> RAP/Folder Review. The inmate's present offense is Att CSCS 3, this is his 2nd state term. This offense involved the sale of crack/cocaine to an undercover police officer. The inmate's legal history includes prior convictions for Assault 3, and CPW 4. Noted is his acceptable disciplinary record. However, his inability to live a crime free lifestyle renders him an unsuitable candidate for presumptive work release. The inmate will be reviewed for CASAT Phase I Treatment, consistent with the sentencing Judge's order, at a late date.
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> "You may reapply for presumptive work release after 07/2009."

The decision of the respondent recites, in part, as follows:

> "In accordance with the established rules and regulations of the temporary release program, I have reviewed your appeal of the Central Office Reviewer's decision. After considering all factors both positive and negative, including your comments and available records and facility and program adjustment, I have affirmed the decision of the Central Office Reviewer."

Under Corrections Law Section 855 (9), participation in a temporary release program is a privilege, not a right (see Matter of Vaughan v Goord, 26 AD3d 553, 553-554 [3rd Dept., 2006], lv denied 6 NY3d 886 [2006]; Matter of Crispino v Goord, 31 AD3d 1022 [3rd Dept., 2006]; Walker v. Le Fevre, 193 AD2d 982, [3rd Dept., 1993]; Matter of Szucs v Recore, 209

AD2d 803 [3rd Dept., 1994]). "'[The scope of judicial review] of a determination to deny an application to participate in such a program is limited to consideration of whether the determination "violated any positive statutory requirement or denied a constitutional right of the inmate and whether [it] is affected by irrationality bordering on impropriety"'" (Matter of Vaughan v. Goord, supra, at 553-554, quoting Matter of Abascal v Maczek, 19 AD3d 913, 914 [3rd Dept., 2005], lv denied 5 NY3d 713 [2005], quoting Matter of Gonzalez v Wilson, 106 AD2d 386, 386-387 [2nd Dept., 1984]). Denial of a temporary release application may be based upon the seriousness of the crime for which petitioner is incarcerated (see Matter of Peck v Maczek, 38 AD3d 948 [3rd Dept., 2007]; Matter of Crispino v Goord, 30 Ad3d 874 [3rd Dept., 2006]), his violent criminal history (see Matter off Wiggins v Joy, 46 AD3d 1035 [3rd Dept., 2007]; Matter of Collins v Goord, 24 AD3d 1048 [3rd Dept., 2005]; Smith v. Recore, 209 AD2d 812 [3rd Dept., 1994]), his history of recidivism (see Montgomery v. Recore, 217 AD2d 777 [3rd Dept., 1995]), and the risk he would pose to community safety (see Matter of Cody v Pataki, 24 AD3d 1058 [3rd Dept., 2005; Montgomery v Recore, 217 AD2d 777 [3d Dept., 1995]), including past violations of conditions of parole supervision (see Matter of Collins v Goord, 24 AD3d 1048 [3rd Dept., 2005]), and past violations of a temporary release contract (see Bruno v Recore, 227 AD2d 709 [3rd Dept., 1996]). Under proper circumstances it is appropriate for the temporary release committee to direct petitioner not to reapply (see Moulden v Coughlin, 210 AD2d 997 [4th Dept., 1994]).

Notwithstanding the foregoing, the Court is also aware of the order of Hon. James

F.X. Doyle, the Suffolk County Court Judge who sentenced the petitioner. The order, dated March 19, 2007 directed that the petitioner be enrolled in the CASAT program. The order recites as follows:

> "The defendant having made a motion pursuant to Penal Law § 60.04 (6) for an order directing the Department of Correctional Services to enroll the defendant in the Comprehensive Alcohol and Substance Abuse Treatment Program, and the court having imposed a sentence that requires a commitment to the State Department of Correctional Services, it is hereby
>
> "Ordered, that, pursuant to Penal Law § 60.04 (6), the Department of Correctional Services is directed to enroll the defendant in the Comprehensive Alcohol and Substance Abuse Treatment Program, provided that the defendant will satisfy the statutory eligibility criteria for participation in such program."

Penal Law § 60.04 (6) recites as follows:

> "Substance abuse treatment. When the court imposes a sentence of imprisonment which requires a commitment to the state department of correctional services upon a person who stands convicted of a controlled substance or marihuana offense, the court may, upon motion of the defendant in its discretion, issue an order directing that the department of correctional services enroll the defendant in the comprehensive alcohol and substance abuse treatment program in an alcohol and substance abuse correctional annex as defined in subdivision eighteen of section two of the correction law, provided that the defendant will satisfy the statutory eligibility criteria for participation in such program. Notwithstanding the foregoing provisions of this subdivision, any defendant to be enrolled in such program pursuant to this subdivision shall be governed by the same rules and regulations promulgated by the department of correctional services, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program. No such period of court ordered corrections based drug abuse treatment pursuant to this subdivision shall be required to extend beyond the defendant's conditional release date."

In Matter of Bailey v Joy (11 Misc3d 941 [Sup. Ct., Westchester Co., 2006]), the Court was presented with a situation very similar to the one at bar. As relevant here the sentencing judge, upon motion of the defendant pursuant to Penal Law § 60.04 (6), ordered the Department of Correctional Services to enroll the petitioner in the CASAT program provided that he satisfied the statutory eligibility requirements for enrollment in the program. Upon being received by the Department of Corrections he applied to be enrolled in the CASAT program. He was administratively denied enrollment by reason of his prior criminal history. The court, applying well established rules of statutory construction, found that under Penal Law § 60.04 (6) the only eligibility requirements were statutory (specifically that the inmate be within two years six months of parole eligibility). The Court found that the failure of Penal Law § 60.04, to expressly mention that an inmate is also subject to administrative review by the respondent with respect to eligibility "was intentional and not inadvertent" (Bailey, supra, at 946. The court commented:

> "In addition, and perhaps most importantly, if this Court were to accept DOCS interpretation, the result would be to return the ultimate decision making concerning CASAT enrollment to DOCS thereby effectively repealing Penal Law § 60.04 (6). It is a fundamental cannon of statutory construction that a Court must avoid an interpretation that renders it a nullity (McKinney's Cons Laws of NY, book 1, Statutes § 98. At 223-24; Matter of Yolanda D., 88 NY2d 790, 794, 673 N.E.2nd 1228, 651 NYS2d 1 [1996])." (Matter of Bailey v Joy, supra, at 946).

The foregoing interpretation appears to be supported by the Memorandum of the Assembly Rules Committee issued with respect to the adoption of Penal Law § 60.04 (L

2004, C 738), which recites in part as follows:

> "Under current law, the Department of Correctional Services has the discretion to place or not place inmates into the CASAT program. Under the bill, judges would also be given the discretion to make such placements. Offenders placed in CASAT by courts, however, would then become subject to all of the normal rules and requirements imposed on other CASAT offenders by the corrections department.* * *"

If the Court were to adopt respondent's interpretation, an inmate applying for admission to the CASAT program would still be subject to discretionary review by the temporary release committee, even though the sentencing court had issued an order pursuant to Penal Law § 60.04 (6). Were this the case, Penal Law § 60.04 (6), and orders issued pursuant thereto, would serve no useful purpose, since even prior to the adoption of Penal Law § 60.04 (6), a sentencing court could always make recommendations for alcohol or substance abuse treatment. The Court recognizes that Penal Law § 60.04 (6) recites that any defendant to be enrolled in the CASAT program "shall be governed by the same rules and regulations promulgated by the department of correctional services, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program" (see Penal Law § 60.04 [6], supra). The Court finds that the purpose of this provision is to insure that once enrolled in CASAT, an inmate will then be subject to all applicable rules and regulations. It does not operate to overrule or contradict the previous sentence thereof, which recites that

the defendant must only satisfy *statutory* eligibility criteria[1].

The Court finds that the determinations at issue are affected by an error of law, arbitrary and capricious and an abuse of discretion.

To the extent that the petition may be deemed an application for mandamus to compel, the Court is mindful that mandamus is an extraordinary remedy, available, as against an administrative officer, only to compel the performance of a duty enjoined by law (see, Klostermann v Cuomo, 61 NY2d 525, 539, 540). It is only appropriate where the right to relief is "clear" and the duty sought to be enjoined is performance of an act commanded to be performed by law, purely ministerial and involving no exercise of discretion (Mtr Hamptons Hosp v.Moore, 52 NY2d 88, 96 [1981]; Matter of Legal Aid Socy. Of Sullivan County v Scheinman, 53 NY2d 12, 16; Matter of Council of the City of New York v Bloomberg, 6 NY3d 380, 388 [2006]). "'The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty'" (Klostermann v Cuomo, supra, p. 540, quoting People ex rel. Schau v McWilliams, 185 NY 92, 100).

In this instance, once statutory eligibility was established, it was respondent's responsibility to carry out the ministerial task of admitting petitioner to the CASAT program. Respondent has presented no evidence to establish any form of physical or practical impediment which prevented respondent from doing so. The Court finds that to the extent

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[1]Respondent has not, in either its administrative decisions, or the instant CPLR Article 78 proceeding, taken the position that the petitioner does not satisfy statutory eligibility requirements (see generally, Corrections Law §§ 2 [18], 851 [2]).

that the petition is one in the nature of mandamus to compel, it should be granted.

Under all of the circumstances, the Court concludes that the petition must be granted, and the respondent must, pursuant to the directive of the sentencing judge in the order dated March 19, 2007, grant petitioner's application for presumptive work release.

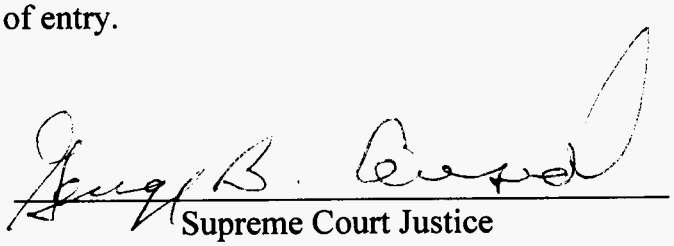
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is granted, and the respondent is directed, within thirty (30) days, to admit the petitioner to presumptive work release, and to enroll him in the CASAT program.

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/Judgment with notice of entry.

ENTER

Dated: September 9, 2008
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 17, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 27, 2008, Supporting Papers and Exhibits
3. Petitioner's Supplemental Appendix sworn to June 17, 2008