STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of PHILLIP ST. LOUIS,

Petitioners,

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

-against-

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Respondents,

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-08-ST9462 Index No. 8663-08

Appearances: John T. Casey, Jr., Esq.
Attorney For the Petitioner
47 Second Street
Troy, NY 12180

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Justin C. Levin,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), has commenced the above-captioned CPLR Article 78 proceeding to review a determination dated June 24, 2008 in which his application for

temporary release was denied.

The Court notes that the undersigned entertained a prior CPLR Article 78 proceeding involving this petitioner in 2008. In that proceeding the petitioner (together with two other inmates) sought review of a policy adopted by DOCS whereby it would not credit inmates with what is known as supplemental merit time (see § 30 [1] of L 2004, ch 738 of the Laws of New York [un-codified]) in determining whether such inmates were eligible to apply for temporary release under Corrections Law §§ 851 (2), 851 (2-b), and 2 (18). In a decision-order-judgment dated March 3, 2008 this Court held that supplemental merit time must be considered in determining an inmate's eligibility to participate in the temporary release program.

After the issuance of the foregoing judgment, DOCS determined that the petitioner was eligible for the Comprehensive Alcohol and Substance Abuse Treatment ("CASAT") Program (see 7 NYCRR Part 1950). The temporary release committee (on April 14, 2008) and the Superintendent of Eastern Correctional Facility (on April 16, 2008) approved the application. The matter was referred to the Central Office, which denied the application on April 17, 2008 in the following decision:

> "This is to advise you that the application for presumptive work release of the above individual has not ben approved by the Central Office Reviewer for the following reasons: I/O Nature, Recdivst Hst.
>
> "Reviewer's Comments: Inmate's present offense is CPCS 3 & CSCS 3. This is his 2nd state term. This offense involved the possession and sale of drugs. The inmate's legal history includes prior convictions for disorderly conduct & CPCS 2. noted is his acceptable disciplinary record. However, his inability to live a crime free lifestyle which is evidenced by his 2 state terms & numerous convictions renders him an

> unsuitable candidate for presumptive work release"
>
> "Inmate may re-apply for presumptive work release after 04/01/2010."

Upon appeal, the Director of the Temporary Release Program, on June 24, 2008, issued the following determination:

> "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.
>
> "The inmate may reapply for presumptive work release on 04/01/2010."

As pointed out by the petitioner, the criteria for review of an application for presumptive work release are set forth in § 1951.2 of the Rules of the Department of Correctional Services which recites as follows:

> "Central office temporary release will review the inmate's suitability for work release or presumptive work release, pursuant to the provisions of Part 1900 of this Title. However, an inmate may only be deemed unsuitable for presumptive work release approval based upon one or more of the following criteria: (a) crime of commitment; (b) criminal history; (c) custodial adjustment; or (d) outstanding warrants/detainers" (7 NYCRR 1951.2).

The petitioner maintains that the respondent, in arriving at his determination, improperly considered factors other than those set forth in the foregoing rule. The petitioner cites three post-determination statements in support of his argument, among them a comment of Senior Counselor Vondell made at an orientation program at Franklin Correctional Facility on July 24, 2008, in which Mr. Vondell apparently remarked: "Don't quote me on this, but

eligibility for CASAT and temporary release is fluid, in that it all depends upon availability of bed space, and one day you may be ineligible, the next day we will move you to CASAT."

The petitioner also cites a letter from Anthony J. Annucci, Executive Deputy Director of the Department of Correctional Services to petitioner's attorney. The letter, dated May 19, 2008, stated in part as follows:

> "Although the Department has recently changed its temporary release procedures to measure proximity to the supplemental merit time date in the seeding of applications for CASAT, the Department will give due consideration to the amount of time remaining on an inmate's sentence in weighing whether or not to approve of an application. In the case of inmate St. Louis, his conventional parole eligibility date is not until January 3, 2014, and his conditional release date is May 3, 2017."

The Court must first observe that there is no evidence in the record that either of these individuals took part in the determination under review here. Nor is there evidence that the policies which they mention served as a basis for the determination to deny petitioner's application. In this respect the statements of Mr. Vondell and Deputy Director Annucci have not been shown to have any direct relevance to the determination at bar. That being said, it is conceivable that admission to the CASAT program could rationally be denied by reason of limited available space in an alcohol and substance abuse treatment correctional annex. If the demand for CASAT placements exceeded DOCS ability to physically accommodate such placements, the policy described by Mr. Annucci might be deemed lawful and rational, in order to insure that those inmates nearest release are afforded an opportunity to participate in the CASAT program.

Lastly, the petitioner indicates that on May 15, 2008, petitioner's mother, Shirley P.

St. Louis, contacted a former DOCS employee, Margaret "Peg" Wolcott, who agreed to inquire with regard to the reasons why the petitioner's temporary release application was denied. The petitioner has submitted the affidavit of his mother in which she indicates that Ms. Wolcott told her that she spoke to Temporary Release Reviewer King, who informed Ms. Wolcott that "I am not about to let this guy on the street, he's a drug dealer and he's got a ten year prison sentence". Ignoring the fact that the statement constitutes a form of double hearsay, in the Court's view this post-determination statement, while forcefully expressed, does not conflict with Ms. King's written decision, or violate Rule 1951.2 (see 7 NYCRR 1951.2). The sum and substance of the statement is that temporary release was denied by reason of the crimes for which the petitioner was incarcerated.

The petitioner argues that the determination violates his constitutional rights to equal protection and due process. With respect to his equal protection argument, it is well settled that "the right to equal protection of the laws survives incarceration" (Doe v Coughlin, 71 NY2d 48 [1987], at 56, citing Lee v Washington, 390 US 333 and Durso v Rowe, 579 F2d 1365, cert denied 439 US 1121); "and that administrative as well as legislative classifications are subject to equal protection review" (id., citing Turner v Safley, 482 US 78 and Buckley v Coyle Pub. School Sys., 476 F2d 92). As stated in Doe v Coughlin (supra):

> "Equal protection does not require absolute equality, however, or precisely equal advantages. Rather, in the absence of a classification affecting fundamental rights or creating suspect classifications which must be invalidated unless justified by some compelling State interest, equal protection requires only that a classification which results in unequal treatment rationally further some legitimate, articulated state purpose" (id., quotation omitted).

"The essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated be treated alike" (Bower Associates v Town of Pleasant Valley, 2 NY3d 617 [2004], at 630). With respect to selective enforcement, "a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (id., at 631, citing Harlen Assoc. v Inc. Vil. of Mineola, 273 F3d 494, 499 [2d Cir 2001]; see also Matter of Northway 11 Communities, Inc. v Town Board of the Town of Malta, 300 AD2d 786, 788 [3d Dept., 2002]).

In this instance the petitioner has identified twelve inmates who have multiple felonies and multiple terms of state imprisonment. That, however, is where the similarity and the basis for comparison ends. The petitioner has been convicted, as a second felony offender, of three Class B felonies. None of the inmates that have been cited as being similarly situated have been shown to be multiple Class B (or greater) felony offenders at the time they were granted temporary release. Nor has sufficient information been presented with regard to their respective criminal histories.[1]

Apart from the foregoing, the Court is of the view that there is no evidence in the record that the determination was "based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad

---

[1]Thus, there is no factual basis to support a finding that the petitioner stands in the position of being similarly situated to the other inmates. In this respect however, even if the other inmates were Class B (or greater) felony offenders, absent an analysis of their respective criminal histories, and other relevant factors, there would be no way of knowing whether such inmates were similarly situated.

faith intent to injure a person" (see Bower Associates v Town of Pleasant Valley, supra, at 631). Specifically, the record does not support the contention that the determination at issue here was motivated out of any form of animus towards the petitioner and/or a desire to punish the petitioner for having successfully prosecuted the prior CPLR Article 78 proceeding. For all of the foregoing reasons, the Court finds that petitioner's equal protection argument must fail.

With regard to petitioner's due process argument (under US Const 14th Amendment and NY Const., Art I § 6), it is argued that the respondent's interpretation of the regulations governing the CASAT program is vague, arbitrary and discriminatory. As a part of this argument the petitioner makes reference to other second felony offenders who have been granted entry into the CASAT program. Again, absent detailed information concerning the crimes for which such inmates were incarcerated, and their criminal histories, the Court has no basis upon which it may draw the conclusion that the actions of the respondent violate principles of due process. The rules of the Department of Correctional Services with regard to admission to the CASAT program and/or the Department's implementation of said rules, have not been shown to be impermissibly vague (see Matter of Clark v Goord, 32 AD3d 1142, 1143 [3rd Dept., 2006]).

With respect to relief in the nature of mandamus, the Court observes 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 Maron v Silver, 58 AD3d 102 [3rd Dept., 2008]). "'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, at 540, quoting People ex rel. Schau v McWilliams, 185 NY 92, 100).

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]) and his history of recidivism (see Montgomery v. Recore, 217 AD2d 777 [3rd Dept., 1995]). The Court finds that inasmuch as the grant or denial of temporary release is within broad parameters

of discretion, that relief in the nature of mandamus to compel does not lie. In addition, the Court finds that the petitioner has not demonstrated that the respondent abused his discretion in denying petitioner's application for admission to the CASAT program.

One final point must be made. In his reply affirmation (and during oral argument), it was pointed out that during the pendency of the instant CPLR Article 78 proceeding, without prior notice (and without the petitioner having submitted a new temporary release application), the petitioner was summoned to appear before the Temporary Release Committee of Franklin Correctional Facility. The appearance took place on November 3, 2008, just before commencement of the instant CPLR Article 78 proceeding. In a determination dated November 17, 2008 the petitioner was again denied temporary release. This time however, he was directed not to re-apply until November 2010 (seven months beyond the April 1, 2010 date set forth in the determination under consideration here). The petitioner cites this incident as further evidence that he is being singled out for special attention, and being punished for invoking his civil remedies within the courts. Notably, the November 17, 2008 temporary release denial is not under review by this Court in this proceeding[2]. Nor does the Court discern how the November 17, 2008 determination (or the attending circumstances) directly relates to the determination under review here. The Court takes note of the argument being advanced, that this constitutes further evidence that the petitioner has been singled out by the respondent for special treatment; and that the petitioner is being denied entry into the temporary release program for improper reasons.

---

[2]During the pendency of the instant proceeding the petitioner commenced a second CPLR Article 78 proceeding to review the February 17, 2008 determination. That proceeding has been referred to the undersigned for disposition.

In the Court's view, this November 17, 2008 post-determination event and attending circumstances does not furnish evidentiary support for petitioner's claim of bias or other various arguments with respect to the April 17, 2008 and June 24, 2008 determinations, including the alleged violation of his right to equal protection. Apart from the foregoing, even if the November 17, 2008 determination was found to be improperly or incorrectly decided, this would not serve as a basis to vacate the June 24, 2008 determination under review here.

For all of the foregoing reasons, the Court concludes that the petition must be dismissed.

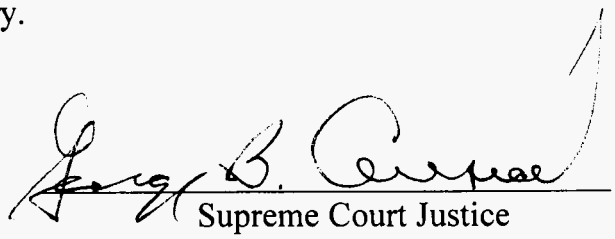
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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 with notice of entry.

ENTER

Dated: March 19, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition October 17, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 31, 2008
3. Reply Affirmation dated November 26, 2008