Matter of St. Louis v Fischer

2009 NY Slip Op 32735(U)

October 7, 2009

Supreme Court, Albany County

Docket Number: 1345-09

Judge: George B. Ceresia

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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 CORREC-
TIONAL SERVICES,

Respondents,

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-09-ST9948 Index No. 1345-09

Appearances: John T. Casey, Jr., Esq.
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The above-captioned CPLR Article 78 proceeding is the third such proceeding commenced by the petitioner, a prison inmate, in connection with his effort to participate in the Comprehensive Alcohol and Substance Abuse Treatment ("CASAT") Program and

[* 2]

Temporary Release Program (see generally Correction Law Article 26; and Parts 1900 and 1950 of the Rules of the Department of Correctional Services [7 NYCRR Parts 1900, 1950]). In the first CPLR Article 78 proceeding, the New York State Department of Correctional Services had found that the petitioner was ineligible to apply for the CASAT program. He filed a grievance of the determination, which was denied. He then commenced a CPLR Article 78 proceeding seeking judicial review of the grievance determination. This Court, in a decision/order/judgment dated March 3, 2008, reversed the determination of the Department of Correctional Services, vacated the grievance determination and upheld the grievance, upon a finding that the petitioner was eligible to apply for the CASAT program under Correction Law § 851 (2-b). The petitioner thereafter re-submitted his application for participation in the CASAT program. This time the application was accepted and reviewed on the merits. The application however, was denied, and the petitioner was directed not to re-apply until April 2010. This prompted the petitioner to commence a second CPLR Article 78 proceeding to review that determination, which was assigned to the undersigned. The Court dismissed the proceeding in a decision/order/judgment dated March 19, 2009, finding that the respondent had acted within its discretion in denying the application.

The petitioner alleges that during the pendency of the second CPLR Article 78 proceeding (specifically, on November 7, 2008), without his having submitted any other application for temporary release, he was brought before the Franklin Correctional Facility Temporary Release Committee. In a determination received by the petitioner on November 14, 2008, temporary release was denied, but this time the petitioner was directed not to re-

[* 3]

apply until November 2010, seven months beyond the April 2010 re-application date previously imposed. The Central Office Reviewer affirmed the determination on January 7, 2009. The petitioner has commenced the instant CPLR Article 78 proceeding to review the November 2008 determination.

The petitioner maintains that the respondent acted improperly in bringing him before the Franklin Correctional Facility Temporary Release Committee on November 7, 2008 since he had not submitted an application for temporary release. He argues that the respondent also acted improperly by arbitrarily moving the re-application date backwards, to November 2010. He identifies twenty-three multiple felony offenders who he alleges have been admitted into the CASAT program or temporary release program, and argues that inmates having far worse criminal records than his have been admitted to the temporary release program. He cites the foregoing in support of his argument that his constitutional right to equal protection has been violated.

The decision of the Franklin Correctional Facility Temporary Release Committee recites as follows:

> "Your application for temporary release work release has been denied by the temporary release committee for the following reason(s):
> I/O Nature   Recdivst Hst
> Explanation:
> Denial of work release is based on nature of I.O. For CPCS 3rd and CSCS 3rd and a criminal history dating back to 1983. He had a prior NYS incarceration in 1990 for CPCS 2nd. TRC notes positive program completions of vocational, ASAT and Transitional Services 1 and 2."

The appeals decision of the Central Office recites as follows:

> "After reviewing all factors in this case, both positive and

[* 4]

> negative, the decision has been made to affirm the TRC decision in this case.
> Reasons: I/O Nature Recdivst Hst
> Comments:
> Your legal history includes prior convictions for disorderly conduct and CPCS 2. The instant offense involved the possession and sale of drugs. Completion of the ASAT program is noted however. Your continuing criminal behavior coupled with the negative impact illegal drugs have on the community renders you unsuitable for work release.
> The inmate may re-apply for work release on 11/2010."

The respondent controverts the petitioner's assertion that the respondent improperly brought the petitioner before the Franklin Correctional Facility Temporary Release Committee on November 7, 2008. The respondent has submitted a copy of an application for work release dated November 3, 2008 bearing petitioner's name. It is indicated that this was the reason that the petitioner was brought before the Temporary Release Committee on November 7, 2008. The respondent goes on to explain that the petitioner had submitted two different applications at different times. The first application, submitted in March 2008, was for participation in the CASAT program, which contains a work release element (see 7 NYCRR 1950.2). That application was denied by the Central Office on April 17, 2008, with a direction not to re-apply until April 2010. The respondent indicates that petitioner's re-application date for the CASAT program remains April 2010. The respondent goes on to explain that the second application (the one under consideration in the instant proceeding) was for work release, a separate and distinct program (see 7 NYCRR 1900.3 [f]). That application was denied on November 7, 2008, with a direction not to re-apply until November 2010. In reviewing the latter determination, as well as petitioner's application dated November 3, 2008, the Court discerns no mention of the

CASAT program. The Court finds that the determination which is the subject of the instant CPLR Article 78 proceeding was made in connection with petitioner's subsequent application for work release, not in connection with his prior application to participate in the CASAT program. As a consequence, the Court finds petitioner's argument, that he was improperly brought before the Franklin Temporary Release Committee, and/or that his date to re-apply for the CASAT program was arbitrarily pushed back seven months to have no merit.

Under Corrections Law Section 855 (9), participation in a temporary release program is a privilege, not a right (see Matter of Herber v Joy, 61 AD3d 1142 [3rd Dept., 2009]; 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 Herber v Joy, supra; Matter of Peck v Maczek, 38 AD3d 948 [3rd Dept., 2007]; Matter of Crispino v Goord, 30 Ad3d 874 [3rd Dept., 2006]), 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]).

In this instance, it appears from a review of the determinations of the temporary release committee and the central office, that positive as well as negative factors were considered. The fact that each body found that negative factors outweighed the positive ones does not render the determinations irrational, arbitrary and capricious.

With respect to petitioner's 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 [7th Cir., 1978], 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]).

The Court observes that the petitioner was convicted of one count of criminal possession of a controlled substance, third degree, a class B felony (see Penal Law § 220.16) and two counts of criminal sale of a controlled substance third degree, a class B felony (Penal Law § 220.39). As noted, the petitioner has identified twenty-three inmates whom petitioner indicates have multiple felonies and multiple terms of state imprisonment, but are alleged to have been approved either for work release, or for entry into the CASAT program. None of the inmates that petitioner cites as being similarly situated have been shown to have three current Class B (or higher) felony offences at the time they were approved for the CASAT Program or for temporary release.[1] Irrespective of this however, even if some of the inmates were shown to have comparable criminal records, this fact would not, of itself, necessarily implicate an equal protection violation. Other factors, as noted above, must also be considered; and the determination is a matter of discretion.

In the Court's view, and as the respondent points out, petitioner's allegations with respect to selective and/or disparate treatment are non-factual and conclusory[2]. With

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[1]Such information is readily available at the New York State Department of Correctional Services Website (http://nysdocslookup.docs.state.ny.us).

[2]For this reason the Court finds no basis to grant petitioner's request for discovery of inmate criminal histories.

respect to the issue of selective enforcement, there is no evidence in the record of selective treatment. Nor is there evidence 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 faith intent to injure a person" (see Bower Associates v Town of Pleasant Valley, supra, at 631). Specifically, the record does not support the petitioner's assertion that the determination 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 first CPLR Article 78 proceeding. For all of the foregoing reasons, the Court finds that petitioner's equal protection argument has no merit.

One further point should be made. To the extent that the petition requests a judgment compelling the respondent to grant petitioner work release, 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, 124-125 [3rd Dept., 2008], lv to app denied 12 NY3d 909). "'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). Due to the discretionary nature of determination

[* 9]

under consideration, the Court finds that relief in the nature of mandamus to compel is not available.

The Court has reviewed and considered petitioner's remaining arguments and finds them to be without merit. The Court finds that the determination to deny petitioner's application for temporary release did not violate any positive statutory requirement or deny him a constitutional right. Nor was it affected by irrationality bordering on impropriety. Petitioner has not demonstrated that the determination was irrational, in violation of lawful procedure, affected by an error of law or arbitrary and capricious.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

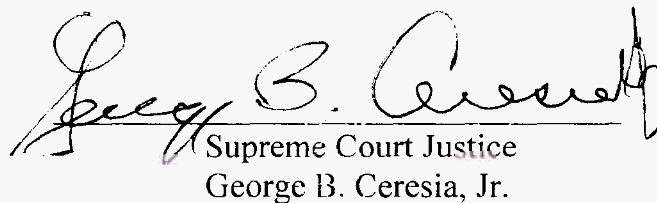
Accordingly it is

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

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: October 7, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated February 19, 2009, Petition, Supporting Papers and Exhibits
2. Notice of Petition dated June 1, 2009
3. Petitioner's Answer dated June 23, 2009