

<b>Matter of Trinh v Yelich</b>
2010 NY Slip Op 30155(U)
January 11, 2010
Supreme Court, Franklin County
Docket Number: 2009-1250
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  
**ROBERT T. TRINH, #04-R-1382,**  
Petitioner,

for Judgment Pursuant to Article 70  
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT  
RJI #16-1-2009-0471.101  
INDEX # 2009-1250  
ORI # NY016015J**

-against-

**BRUCE YELICH**, Superintendent,  
Bare Hill Correctional Facility, and  
**NYS BOARD OF PAROLE,**  
Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Robert T. Trinh, verified on September 9, 2009, and filed in the Franklin County Clerk's office on September 11, 2009. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on September 22, 2009, and has received and reviewed respondent's Return, dated October 30, 2009, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on November 10, 2009.

On June 12, 2009, petitioner, who had been conditionally released from DOCS custody to post-release supervision on August 10, 2007<sup>1</sup>, was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in four separate respects. The Notice of Violation stated that petitioner was not entitled to a preliminary parole revocation hearing and specified that the final hearing

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<sup>1</sup> Although the record indicates that petitioner was originally released to parole supervision in New York, it appears that such supervision was subsequently transferred to California under the Interstate Compact for Adult Offender Supervision (Executive Law §259-mm).

would be held on June 25, 2009. On that date the final hearing was conducted at the Dutchess County Jail, with the petitioner represented by counsel throughout. At the outset of the hearing the presiding Administrative Law Judge (ALJ) referenced a series of documents including the Notice of Violation signed by the petitioner on June 12, 2009. After doing so the ALJ asked counsel for the petitioner if he had any objections and when counsel responded in the negative the documents were admitted into evidence. An agreement was then placed on the record whereby petitioner pled guilty to one parole violation charge, his parole was revoked with a modified delinquency date of March 3, 2009, and a 12-month delinquent time assessment was imposed. Neither petitioner nor his counsel interposed any objection during the course of the final parole revocation hearing.

Petitioner's notice of administrative appeal from the parole revocation determination was received by the Division of Parole Appeals Unit on July 29, 2009, and by letter bearing that date petitioner was advised that the latest date for him to submit documents perfecting the administrative appeal was November 27, 2009. It is not clear from the record whether petitioner's administrative appeal was, in fact, ever perfected.<sup>2</sup> In the meantime, this proceeding was commenced when the petition was filed in the Franklin County Clerk's office on September 11, 2009.

Executive Law §259-i(3)(f)(iii) provides, in relevant part, that an alleged parole violator “. . . shall be given written notice of the date, place and time of the [final parole revocation] hearing . . . at least fourteen days prior to the scheduled date.” See also 9

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<sup>2</sup> In paragraph five of his November 5, 2009, Reply, petitioner references 9 NYCRR §8006.4(c) and speculates as to potential consequences “[s]hould the Parole appeal unit declined [sic] to render findings and determination, as is customary . . .” Although this language suggest that petitioner may have perfected, or planned to perfect, his administrative appeal prior to the November 27, 2009, deadline, there is no clear indication in the record that the administrative appeal was ever perfected.

NYCRR §8005.18(a). Citing, *inter alia*, *People ex rel Smith v. New York State Board of Parole*, 131 AD2d 401 and *People ex rel Andersen v. New York State Board of Parole*, 94 AD2d 807, petitioner asserts entitlement to immediate release from DOCS custody based upon the fact that he was served with the Notice of Violation/Violation of Release Report 13 days prior to the June 25, 2009, final parole revocation hearing, allegedly in violation of the 14-day minimum notice requirement.

A habeas corpus proceeding brought by a parole violator to challenge one or more aspects of the underlying revocation process is subject to dismissal where the violator fails to first exhaust administrative remedies by taking an administrative appeal pursuant to 9 NYCRR Part 8006. See *People ex rel Ariola v. Sears*, 53 AD3d 1001, *lv den* 11 NY 3d 710, *People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715 and *People ex rel Bariteau v. Donelli*, 24 AD3d 1065. At the time petitioner commenced this proceeding his administrative appeal was apparently pending, un-perfected, and thus the four-month window for the Appeals Unit to issue its findings and recommendation, as set forth in 9 NYCRR §8006.4(c), had not yet opened, much less closed. Accordingly, the Court finds that petitioner's challenge is precluded by his failure to exhaust administrative remedies. See *People ex rel Howe v. Travis*, 18 AD3d 1052.

In paragraph four of his Reply petitioner, citing *Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, asserts that under the circumstances of his case “. . . exhaustion of administrative remedies is not required where constitutional claim is raised that acted ULTRA VIRES, and pursuit of administrative remedy would be futile.” In *Watergate II Apartments* the Court of Appeals noted that the exhaustion of administrative remedies requirement “. . . need not be followed . . . when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . or when resort to an administrative remedy would be futile . . .” *Id* at 57 (citations omitted).

The mere fact that petitioner's challenge to the adequacy of his notice of the final parole revocation hearing is couched in terms of a constitutional (due process) violation does not excuse the failure to exhaust administrative remedies since consideration of the constitutional claim may well require the resolution of factual issues reviewable at the administrative level. *See Schulz v. State of New York*, 86 NY2d 225. *See also Roberts v. Coughlin*, 165 AD2d 964 and *Valvano v. Jones*, 122 AD2d 336. In this regard the Court finds that any potential due process violation resulting from the 13-day notice of the final parole revocation hearing must first be considered at the administrative level in light of petitioner's entry into a plea bargain agreement without interposing an objection to the notice deficiency. If such an objection had been interposed by petitioner, or his counsel, it appears that the ALJ could have simply adjourned/re-scheduled the final hearing to allow the requisite notice without compromising petitioner's statutory entitlement to a final parole revocation hearing within 90 days of his return to New York. *See Executive Law §259-o(4)*.

In addition, despite the potential statutory violation, this Court is simply not persuaded that it was "wholly beyond its grant of power," within the meaning of *Watergate II Apartments*, for the Board of Parole to conduct a final parole revocation hearing on 13-days notice to the alleged violator.

Finally, the Court is not persuaded by petitioner's suggestion that his failure to exhaust administrative remedies can be excused as futile. Where an administrative agency has clearly and unequivocally adopted a longstanding policy position at odds with that of an aggrieved individual, such individual maybe excused from exhausting a futile administrative remedy. *See Lehigh Portland Cement Company v. New York State Department of Environmental Conservation*, 87 NY2d 136. Resolution of the issue raised by petitioner in the case at bar, however, is dependent upon the unique factual

circumstances presented rather than any mechanical application of established policy. *See Johnson v. Office of Health Systems Management of the New York State Department of Health*, 251 AD2d 20. The mere fact that resort to administrative remedies may be time consuming does not establish futility. *See Schauseil v. Wing*, 251 AD2d 1080.

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:** January 11, 2010, at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge