

**Matter of McClary v Sears**

2010 NY Slip Op 30376(U)

February 24, 2010

Supreme Court, St. Lawrence County

Docket Number: 130320/2009

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ST. LAWRENCE**  
**X**

In the Matter of the Application of  
**GERALD McCLARY, #04-A-5437,**  
Petitioner,

for Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

-against-

**DECISION AND JUDGMENT**  
**RJI #44-1-2009-0206.17**  
**INDEX # 130320**  
**ORI #NY044015J**

**LAWRENCE SEARS**, Superintendent,  
Ogdensburg Correctional Facility, **DEBRA**  
**JOY**, Director of Temporary Release Program,  
NYS Department of Correctional Services, and  
**NYS DEPARTMENT OF PAROLE**,  
Respondents.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Gerald McClary, verified on March 30, 2009, and filed in the St. Lawrence Court Clerk's office on April 6, 2009. Petitioner, who is now an inmate at the Camp Georgetown Correctional Facility, is challenging his removal from the DOCS Temporary Release Program as well as the apparent resulting revocation of his merit time allowance (Correction Law §803(1)(d)). In addition, the petitioner submitted an application pursuant to CPLR §1101 for poor person status.

By Decision and Order dated April 16, 2009, petitioner's application for poor person status was denied and was directed that this proceeding would be dismissed unless all fees and costs related to filing were paid within 120 days. By letter dated July 7, 2009, the Court Clerk's office advised chambers that the fees in question had been paid. The Court issued an Order to Show Cause on July 9, 2009, and next received respondents' Answer, including Confidential Exhibits H and I, verified on August 26, 2009, as well as

petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on September 3, 2009.

By Letter Order dated November 30, 2009, respondents were directed to supplement their answering papers by providing a certified copy of the transcript of the December 16, 2008, Temporary Release Committee (TRC) hearing and by providing copies of any other documents associated with the procedure whereby petitioner was removed from the Temporary Release Program. In addition, respondents were directed to address petitioner's challenge to the alleged revocation of his merit time allowance. The Court has since received and reviewed respondents' Supplemental Answer, verified on December 21, 2009, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on January 6, 2010.

On June 18, 2006, petitioner was re-sentenced (original sentencing date September 30, 2004) in Suffolk County Court, as a second felony offender, to a determinate term of 7 1/2 years, with 5 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 2°. In January of 2007 petitioner's application to participate in the DOCS Temporary Release Program was approved. In July of 2008, however, petitioner was placed on 30 days work release probation following a curfew violation. In addition, in October of 2008 petitioner was placed on 60 days work release probation following an incident wherein he was charged with disobeying a direct order and exceeding bounds. The Court does note that in the TRC's 60 day probation recommendation the committee described the underlying incident as one involving petitioner's "misunderstanding of contractual process."

The incident underlying petitioner's removal from the Temporary Release Program, which is the subject of this proceeding, involved his alleged failure to report to his workplace on December 12, 2008. Following a temporary release removal hearing

(7 NYCRR §1904.2(h)) conducted on December 16, 2008, the TRC recommended petitioner's removal from the program for the following reasons:

“AFTER A CAREFUL REVIEW THIS COMMITTEE RECOMMENDS REMOVAL FROM WR [work release] PROGRAM DUE TO THE FACT THAT SUBJECT HAS A HISTORY OF BEING OUT OF BOUNDS. 7/9/08 30 DAYS PROBATION FOR CURFEW VIOLATION, 10/8/08 60 DAYS PROBATION FOR EXCEEDING BOUNDS.”

The removal recommendation was approved at the facility superintendent level (7 NYCRR §1904.2(i)) on December 19, 2008, and, as appears from Exhibit A attached to the petition, petitioner signed for receipt of a copy of the TRC recommendation, as approved by the superintendent, on December 22, 2008. By correspondence dated December 30, 2008, petitioner took an administrative appeal from the temporary release removal determination pursuant to 7 NYCRR §1904.4 but the DOCS Director of Temporary Release affirmed the removal determination.

In the meantime, a merit time review conducted up to the facility superintendent level (7 NYCRR §280.4(a)(2)) reflected findings, as of December 11, 2008, that petitioner was eligible for a merit time allowance. The ultimate authority to grant or withhold an merit time allowance, however, is vested in the DOCS commissioner, or designee, after central office review. *See* 7 NYCRR §280.4(b)(1)and(2). In the case at bar the record remains devoid of any documentary evidence that the commissioner, or his designee, granted petitioner a merit time allowance. In this regard it is noted that an inmate is not eligible for such an allowance if he or she “. . . was a participant in the temporary release program but was removed for any reason other than an intervening circumstance beyond the control of the inmate . . .” 7 NYCRR §280.2(d)(2)(ii). Thus, the record in this proceeding is not clear as to whether or not petitioner was ever granted a merit time allowance and, if the merit time allowance was granted, whether or not that grant was

revoked pursuant to 7 NYCRR §280.4(b)(4). It appears, however, that petitioner's assertion that he was unlawfully denied merit parole release review before the Parole Board in March of 2009 is ultimately based upon the assertion that he was unlawfully removed from the temporary release program.

In respondents' Supplemental Answer, submitted in response to the Court's Letter Order of November 30, 2009, it was reported that a transcript of the December 16, 2008, TRC hearing could not be provided to the Court for judicial review ". . . due to a mislabeled cassette and the possibility that it was 'inadvertently taped over . . . or the recorder malfunctioned.'" Respondents therefore consent that final judgment be entered vacating the determination to remove petitioner from the temporary release program. Respondents further request that the Court order a new hearing. Petitioner, for his part, opposes this latter request asserting ". . . that he should not be penalized for the Temporary Release Committee careless, irresponsible acts by the inadvertently taping over the hearing or the malfunctioned recorder, which should not be looked at as harmless error." Petitioner therefore request that his petition be granted ". . . and that he be restored to the Temporary Release Program, and a new merit time [parole release] hearing date set . . ."

7 NYCRR §1904.2(h)(3) requires that an electronic recording of the entire temporary release program removal hearing be made. Although unaware of any case law addressing the impact on a temporary release removal determination of DOCS's inability to provide a transcript of the underlying hearing for judicial review, this Court finds it appropriate to consider analogous caselaw addressing the inability of DOCS officials to provide transcripts of prison disciplinary proceedings. The Court finds that the respondents' inability to produce a transcript of the December 16, 2008, temporary release program removal hearing does not involve the substantial evidence issue nor does

it implicate any fundamental due process rights. Based upon such findings, and in view of the inherent serious nature of charges associated with any inmate's violation of temporary release rules, the Court agrees that a remand for a new hearing, rather than expungement, is the proper remedy in this situation. *See Auricchio v. Goord*, 273 AD2d 571 and *Monko v. Selsky*, 246 AD2d 669.

As far as petitioner's merit time allowance is concerned, the Court finds no basis to direct the implementation of such allowance pending the outcome of the temporary release program removal re-hearing.

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

**ADJUDGED**, that the petition is granted, without costs or disbursements, but only to the extent that the determination removing petitioner from the temporary release program following the December 16, 2008, hearing is vacated and the matter remanded for a new hearing to be conducted as soon as practicable but in no event no more than 45 days from the date of this order.

**Dated:** February 24, 2010, at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Justice