

Matter of Harris v Evans
2010 NY Slip Op 32081(U)
July 30, 2010
Supreme Court, New York County
Docket Number: 400981/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

HARRIS, GEORGE

INDEX NO. 400981/0

MOTION DATE _____

ANDREA W. EVAN

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

*E
2/4/10
ec*

The following papers, numbered 1 to 24 were read on this motion to/for Article 78 relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1A-12

Answering Affidavits — Exhibits _____

13-15

Replying Affidavits _____

16-24

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition}

petition +
**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

FILED

AUG 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

AUG 2 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/30/10

JBL

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of
GEORGE HARRIS,

Petitioner,

Index No. 400981/10

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

Decision, Order, and Judgment

- against -

ANDREA EVANS, Chairwoman, N.Y.S DIVISION
OF PAROLE

Respondent.

-----X

JOAN B. LOBIS, J.S.C.:

FILED
AUG 05 2010
NEW YORK
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Petitioner George Harris, proceeding as a pro se inmate, brings this proceeding by order to show cause, pursuant to Article 78 of the C.P.L.R., seeking an order compelling respondent Andrea Evans, chairwoman of the New York State Division of Parole (the "Division"), to release him from his current prison term and end his future parole obligations. Respondent cross-moves for an order dismissing the petition as moot and for failing to state a cause of action. For the reasons discussed below, the petition is granted to the limited extent of ordering Andrea Evans, Chairwoman, of the New York State Division of Parole, to continue to process petitioner's discharge consideration.

The facts relevant to this court's determination follow. In 1966, petitioner was convicted of Murder in the First Degree and sentenced to life in prison. On April 11, 1985, after a change in the law, petitioner was granted parole by the Division. On June 20, 1988, a report from petitioner's parole officer suggested that petitioner was "eligible for a discharge from parole, but due

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to his unstable residence, his possible involvement with [a second] murder and in general, poor adjustment, [petitioner] is not being considered for a . . . discharge at this time.” An application for discharge was not submitted on petitioner’s behalf. On June 17, 1989, petitioner was arrested for what he describes as “various criminal charges.” He asserts that he was found not guilty on all charges. In 1990, petitioner was returned to the Department of Corrections (“DOCS”) as a parole violator.

Petitioner was reparaoled in February of 1991. Five years later, on March 28, 1996, petitioner was arrested and charged with criminal sale of a controlled substance in the third degree in Bronx County, a class B felony. See Penal Law § 220.39. He was found guilty of the charge and, on January 7, 1998, sentenced to an indeterminate term of two (2) to six (6) years in prison. Petitioner alleges that the arrest did not result in his parole being revoked; however, attached to the petition is a “Notice of Final Declaration of Delinquency by Board of Parole” dated January 29, 1998. According to the notice, based on petitioner’s 1996 arrest, the maximum sentence for his murder conviction (listed on the form as 77 years and 77 months) “may be added, by [DOCS], to the maximum expiration term” of the drug conviction. On or about April 12, 2002, petitioner, in a inmate grievance form, demanded to DOCS that he be released immediately. DOCS replied informing petitioner that he had still not “satisfied his current sentence.” According to a letter to petitioner dated December 3, 2009 from the Division, petitioner is in custody as a parole violator as a result of his 1996 arrest and is serving his life sentence.

Petitioner commenced this proceeding, by applying for poor persons status to

commence an Article 78, in Oneida County, New York on or about February 28, 2010. By letter dated April 1, 2010, the Honorable Anthony F. Shaheen of the Supreme Court of Oneida County informed petitioner that the proper venue for his proceeding was New York County. On or about April 6, 2010, petitioner forwarded his petition to New York County.

Petitioner asserts that he is entitled to a mandatory release from prison pursuant to Executive Law 259-j(3-a) and that all of his parole obligations should be terminated. On or about May 10, 2010, petitioner submitted a letter to chambers purporting to be a reply, even though no answering papers were yet submitted. On May 21, 2010, respondent wrote a letter to chambers, admitting that petitioner should have been considered for a parole discharge in 1988 and 1991, but that petitioner was not entitled to a mandatory release from prison and discharge from parole obligations. Respondent submitted a proposed order denying the petition and ordering the Division to conduct a "necessary review for discharge consideration" *nunc pro tunc*. Petitioner promptly replied by letter on May 24 and rejected the proposed order. On June 3, 2010, respondent wrote a second letter to chambers, in lieu of formal papers, raising substantive legal arguments. The undersigned directed a letter to the parties dated June 10, 2010, giving respondent twenty (20) days to serve formal responsive papers and petitioner twenty (20) days from his receipt of those papers to submit a reply.¹

On or about June 30, 2010, respondent submitted a notice of cross-motion seeking

¹ Petitioner directed a third letter to chambers, dated June 7, 2010, received after the June 10 letter.

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an order dismissing the proceeding for failure to state a cause of action and on the grounds that the petition will be moot. Respondent argues that petitioner is not eligible for a mandatory release. Respondent admits that petitioner should have been reviewed for a discharge and asserts that the Division “is in the process of submitting a discharge application on petitioner’s behalf and expects to complete the necessary review within four weeks.” On July 6, 2010, petitioner submitted a formal reply and the petition was deemed fully submitted.

“[A] mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists.” In re Anonymous v. Comm’r. of Health, 21 A.D.3d 841, 842 (1st Dep’t 2005); see also C.P.L.R. § 7803(1). “[A] ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.” N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175, 184 (2005), quoting Tango v. Tulevech, 61 N.Y.2d 34, 41 (1983).

Executive Law § 259-j(3-a), on which petitioner exclusively relies, provides, in pertinent part, that “[t]he division of parole . . . must grant termination of sentence after two years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for any . . . felony offense [other than a class A felony] defined in article two hundred twenty or two hundred twenty-one of the penal law.” Those articles deal with drug possession offenses and drug sale offenses. See Penal Law § 220 et seq and § 221 et seq. Executive Law § 259-j(3-a) was passed in 2004 as part of the Rockefeller Drug Law Reform Act, which was designed “to ‘reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief and make related drug law

sentencing improvements.” In re Tavaréz v. Dennison, 14 Misc.3d 289, 293 (J. Bransten) (N.Y. Sup. Ct. 2006), quoting Assembly Mem. in Support, Bill Jacket, L. 2004, ch. 738, at 4.

When petitioner was out of prison in the mid-1980s and early 1990s, he was on parole for first degree murder, not a drug offense. For that reason, Executive Law § 259-j(3-a) does not apply to those periods of time. Therefore, the Division cannot be compelled to terminate petitioner’s sentence. Petitioner seems to believe that the period of unrevoked parole can occur prior to the drug conviction, making Executive Law § 259-j(3-a) stand for the proposition that a paroled violent felon, who is well-behaved for two years, can discharge his parole by being convicted of a later drug offense. Not only does this result run contrary to the purpose and language of Executive Law § 259-j(3-a), it encourages criminal behavior.

Respondent has acknowledged that, under provisions of the Executive Law in effect during petitioner’s periods of parole, a convicted felon who completed three years of unrevoked parole was entitled to be considered for a discharge. Respondent has also acknowledged that it failed to consider petitioner for a discharge and “is in the process of submitting a discharge application on petitioner’s behalf and expects to complete the necessary review within four weeks [of the date of the cross-motion (June 28, 2010)].” The court recognizes that respondent now knows more about petitioner’s criminal behavior and likelihood of recidivism than it did in the mid-1980s and early 1990s as petitioner has been since arrested twice. Nevertheless, the court is unaware of a statute that entitles petitioner to mandatory release from prison or mandatory discharge from parole under the circumstances here. The court urges the Division in conducting its review of petitioner’s

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discharge to consider only the evidence that was available during the periods of time that petitioner was eligible for a discharge. Accordingly, it is

ORDERED that Andrea Evans, Chairwoman, of the New York State Division of Parole, continue to process petitioner's discharge consideration; and it is further

ORDERED that the remainder of the petition is denied.

Dated: July 30, 2010



JOAN B. LOBIS, J.S.C.

FILED
AUG 05 2010
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