

**Matter of Platten v New York State Div. of Parole**

2010 NY Slip Op 32663(U)

September 28, 2010

Sup Ct, Albany County

Docket Number: 6556-09

Judge: Joseph C. Teresi

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SUPREME COURT  
STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of the Application of  
JOHN PLATTEN,

Petitioner,

**DECISION and ORDER**  
**INDEX NO. 6556-09**  
**RJI NO. 01-09-ST0664**

-against-

NEW YORK STATE DIVISION  
OF PAROLE,

Respondent.

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Supreme Court Albany County All Purpose Term, August 20, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

John Platten, #90-C-0145  
*Pro se Petitioner*  
Oneida Correctional Facility  
6100 School Road  
P.O. Box 4580  
Rome, New York 13442

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
Justin C. Levin, Esq.  
*Attorney for Respondent*  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

Petitioner commenced this Article 78 proceeding over one year ago seeking a de novo parole hearing because of Respondent’s failure to comply with two orders of the Supreme Court - Erie County. By Decision and Order, dated November 12, 2009 (hereinafter “Decision and Order”), this court granted the petition and ordered Respondent to conduct a de novo hearing

within 60 days. On this record, it is uncontested that Respondent has not held a de novo hearing for Petitioner that complies with this Court's Decision and Order.

Due to such failure, Petitioner now moves for civil contempt. Respondent opposes the motion and cross moves for denial of the motion.<sup>1</sup> Because Petitioner demonstrated Respondent's contempt as a matter of law, his motion is granted and Respondent's cross-motion is denied.

"To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed... the party to be held in contempt must have had knowledge of the order [and]... prejudice to the rights of a party to the litigation must be demonstrated." (McCain v. Dinkins, 84 NY2d 216, 226 [1994]). Civil contempt "must be proven by clear and convincing evidence, and requires a showing that the rights of a party have been prejudiced." (Town of Copake v. 13 Lackawanna Props., LLC, 73 AD3d 1308, 1309 [3d Dept. 2010]) (citations omitted).

Here, Petitioner has demonstrated Respondent's civil contempt as a matter of law. It is uncontested that the Decision and Order constitutes a "lawful judicial order" and is "unequivocal." It required Respondent to hold a de novo hearing, before a new parole board panel, within 60 days. For such hearing Respondent was ordered to "delete and expunge from Petitioner's institutional record all information required to be expunged by" the Hon. Michael D'Amico's September 7, 2001 and March 15, 2006 Orders. Judge D'Amico's orders required

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<sup>1</sup>Because Respondent did not object to Petitioner submitting his Affidavit in Request to Amend Motion for Civil Contempt, dated August 20, 2010, but instead replied to same on its merits, by letter dated September 3, 2010, both submissions are being considered herein.

Respondent to expunge nine criminal history entries. Despite this Court's Decision and Order and Judge D'Amico's orders, Petitioner's institutional record still contained references to the expunged criminal history entries at Petitioner's de novo hearing. After the de novo hearing, Petitioner's institutional record again contained these expunged entries for his 24 month rehearing. Thereafter, Respondent admits that Petitioner's second de novo hearing (third hearing total), was defective because it was not held before a "different panel." There is no dispute herein that each of these non-compliant hearings was held while this Court's Decision and Order was "in effect" or that Respondent had knowledge of it.

Petitioner also demonstrated prejudice by Respondent's failure to provide him with a compliant hearing. New York inmates eligible for parole consideration possess a statutory right to "a proper hearing in which only the relevant guidelines are considered." (King v. State of New York Div. of Parole, 83 NY2d 788, 791 [1994]; see NY Exec. Law §259-i[2][a][i]; 9 NYCRR 8002.2). Over ten months ago, this Court ordered such a hearing to be held within sixty days. As Respondent admits that it has not yet held a compliant hearing, Petitioner has been deprived of his right to a hearing for almost a year and has clearly been prejudiced by the delay.

In opposition, Respondent failed to rebut Petitioner's showing. First, Respondent's "accidental" excuse is unavailing because "[a] finding of civil contempt . . . does not require a showing that such disobedience was willful." (Conners v. Pallozzi, 241 AD2d 719 [3d Dept. 1997][citations omitted]). Second, as Petitioner has yet to receive a compliant hearing, Respondent's ongoing contempt is clearly not moot. Even if Respondent should now comply, its delay in doing so until after the contempt motion was filed would still allow for a contempt remedy. (See Sager Spuck Statewide Supply Co. v. Meyer, 282 AD2d 971 [3d Dept. 2001]).

Finally, Petitioner need not file a new Article 78 proceeding to seek contempt for Respondent's failure to comply with the Decision and Order. Contempt proceedings are available "to compel compliance with the final judgment." (Friendly Ice Cream Corp. v. Great Eastern Mall, Inc., 51 A.D.2d 883 [4th Dept. 1976]; *See e.g.* Evans v. Bd. of Assessment Review, 284 A.D.2d 753, 756 [3d Dept. 2001]).

Accordingly, Petitioner's motion is granted and Respondent's cross motion is denied. The Department of Parole is fined \$250.00, payable to Petitioner within 10 days of this Order (Judiciary Law §773). Additionally, Respondent is ordered to comply with this Court's November 12, 2009 Decision and Order within thirty days of the date of this Decision and Order. Petitioner's request for attorney's fees, however, is denied because Petitioner failed to demonstrate that he incurred any fees in bringing the present contempt motion. Similarly, because Petitioner's request that this court direct his release is not a proper remedy, such request is also denied. (Quartararo v. New York State Div. of Parole, 224 AD2d 266 [1<sup>st</sup> Dept. 1996]).

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 28, 2010  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated July 6, 2010, Affidavit of John Platten, dated June 25, 2010; Verified Petition, dated June 25, 2010, with attached Exhibits "A" - "E".
2. Affidavit in Request to Amend Motion for Civil Contempt of John Platten, dated August 20, 2010, with attached Exhibits "A" - "E".
3. Notice of Motion, dated August 26, 2010, Affirmation of Justin C. Levin, dated August 26, 2010, with attached Exhibits "A" - "J".
4. Letter of Justin C. Levin, dated September 3, 2010.
5. Reply of John Platten, dated September 2, 2010, with attached unnumbered exhibits.