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| <b>Matter of Hardie v Joy</b>                                                                                                                                                                                              |
| 2011 NY Slip Op 30221(U)                                                                                                                                                                                                   |
| January 25, 2011                                                                                                                                                                                                           |
| Sup Ct, Albany County                                                                                                                                                                                                      |
| Docket Number: 5970-10                                                                                                                                                                                                     |
| Judge: George B. Ceresia Jr                                                                                                                                                                                                |
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In The Matter of the Application of  
JOHN A. HARDIE,

Petitioner,

-against-

DEBRA JOY - CHAIRPERSON OF TEMPORARY  
RELEASE CORE, NYS DEPARTMENT OF  
CORRECTIONAL SERVICES,

Respondent,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-10-ST1944 Index No. 5970-10

Appearances: John A. Hardie  
Inmate No. 09-A-5161  
Petitioner, Pro Se  
Bare Hill Correctional Facility  
Caller Box 20, 181 Brand Road  
Malone, NY 12953

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Cathy Y. Sheehan,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated September 21 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 22, 2010, Supporting Papers and Exhibits

The petitioner, an inmate at Bare Hill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination dated March 1, 2010 to deny petitioner participation in the temporary release program. The decision of the central office reviewer recites, in part, as follows:

“Your application has been denied by the temporary release committee for the following reasons: Violent Hist., PAR/PRB Viol, Recdivst Hst.

“Explanation:

You are currently serving your 3rd NYSDOCS incarceration. Your legal history dates back to 1979 and includes violations under probation and parole supervision, a sodomy and rape conviction and an order of protection. Failure to modify your criminal behavior deems you an unsuitable presumptive work release.

You may not reapply for CASAT until 03/2012.”

The appeals decision recited:

“After reviewing all factors in this case, both positive and 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 two prior NYSDOCS Terms that include convictions for Att. Rape 1 / Sodomy 1. Your instant offense involved possession of counterfeit money and failure to change your address with the Division of Criminal Justice as a registered sex offender. The serious nature of your continued criminal activity, which involves sex offenses renders you unsuitable for temporary release participation.

The inmate may reapply for presumptive work release on 03/2012.”

The petitioner argues that the determination was arbitrary, capricious and irrational

for a number of reasons. He maintains that his risk of recidivism is extremely low. He asserts that there are currently no outstanding orders of protection against him. He indicates that previous parole violations occurred after his first term of incarceration<sup>1</sup>, years ago, and were drug related. With respect to his drug abuse, he indicates that this “problem” was addressed through his participation in the Alcohol and Substance Abuse Program while incarcerated. He argues that insufficient weight was assigned by the temporary release committee to his clean disciplinary record and positive programming while incarcerated. In his view he has already been penalized and held accountable for his previous crimes, for which he is remorseful. He indicates that he resided at liberty for six years before being arrested, and was free from substance abuse for five of those years. He contends that he was unable to re-register as a sex offender because he was in the process of looking for a new residence, by reason that his previous residence had been condemned. He indicates he did not hide and was not attempting to flee. He also asserts that the temporary release committee ignored his prior successful completion of parole, his community support, and his point score on a New York State Static-99 Coding Form (the latter of which attempts to predict recidivism rates based upon certain risk factors). The petitioner criticizes the temporary release committee for focusing exclusively on his criminal history, rather than his current offense, possession of a forged instrument in the first degree, which is nonviolent, and which,

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<sup>1</sup>Petitioner’s first period of state incarceration occurred in 1985 when he was convicted of two counts of sodomy in the first degree and four counts of attempted rape in the first degree. He had four misdemeanor convictions before that.

he maintains, is not serious. He maintains he poses no threat to the community.

Under Corrections Law Section 855 (9), participation in a temporary release program is a privilege, not a right (see Matter of Lapetina v Fischer, 76 AD3d 722 [3<sup>rd</sup> Dept., 2010]; Matter of Herber v Joy, 61 AD3d 1142 [3<sup>rd</sup> Dept., 2009]; Matter of Vaughan v Goord, 26 AD3d 553, 553-554 [3<sup>rd</sup> Dept., 2006], lv denied 6 NY3d 886 [2006]; Matter of Crispino v Goord, 31 AD3d 1022 [3<sup>rd</sup> Dept., 2006]; Walker v. Le Fevre, 193 AD2d 982, [3<sup>rd</sup> Dept., 1993]; Matter of Szucs v Recore, 209 AD2d 803 [3<sup>rd</sup> 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 [3<sup>rd</sup> Dept., 2005], lv denied 5 NY3d 713 [2005], quoting Matter of Gonzalez v Wilson, 106 AD2d 386, 386-387 [2<sup>nd</sup> 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 [3<sup>rd</sup> Dept., 2007]; Matter of Crispino v Goord, 30 AD3d 874 [3<sup>rd</sup> Dept., 2006]), his violent criminal history (see Matter of Wiggins v Joy, 46 AD3d 1035 [3<sup>rd</sup> Dept., 2007]; Matter of Collins v Goord, 24 AD3d 1048 [3<sup>rd</sup> Dept., 2005]; Smith v. Recore, 209 AD2d 812 [3<sup>rd</sup> Dept., 1994]), his history of recidivism (see Montgomery v. Recore, 217 AD2d 777 [3<sup>rd</sup> Dept., 1995]), and the risk he would pose to community safety (see Matter of Cody v Pataki,

24 AD3d 1058 [3<sup>rd</sup> Dept., 2005; Montgomery v Recore, 217 AD2d 777 [3d Dept., 1995]), including past violations of conditions of parole supervision (see Matter of Collins v Goord, 24 AD3d 1048 [3<sup>rd</sup> Dept., 2005]), and past violations of a temporary release contract (see Bruno v Recore, 227 AD2d 709 [3rd Dept., 1996]). Under proper circumstances it is appropriate for the temporary release committee to direct petitioner not to reapply (see Moulden v Coughlin, 210 AD2d 997 [4th Dept., 1994]).

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.

To the extent that petitioner seeks an order in the nature of mandamus (to compel the respondent to grant his temporary release application) the Court is mindful 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 [3<sup>rd</sup> 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). Inasmuch as the action of the temporary release committee is purely discretionary, the Court finds that relief in the nature of mandamus does not lie, and may not be granted.

The Court has reviewed and considered petitioner’s remaining arguments and finds them to be without merit.

For all of the foregoing reasons, the Court concludes that the petition must be dismissed.

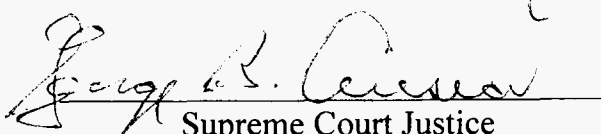
Accordingly, it is

**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: January 25, 2011  
Troy, New York

  
Supreme Court Justice