

Mayfield v Evans

2011 NY Slip Op 30552(U)

March 7, 2011

Supreme Court, New York County

Docket Number: 402836/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____

PART 52

Index Number : 402836/2010
MAYFIELD, CLARENCE
vs.
EVANS, ANDREA
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision.*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/7/11

Cy

CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
CLARENCE MAYFIELD,

Petitioner,

Index No. 402836/10

-against-

DECISION/JUDGMENT

ANDREA EVANS, CHAIRWOMAN,
NEW YORK STATE DIVISION OF PAROLE,

Respondent.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner commenced this Article 78 proceeding to challenge the determination of respondent Andrea Evans, Chairwoman of the New York State Division of Parole ("Respondent"), imposing a 36-month time assessment for violation of the terms of his parole. He challenges Commissioner Ferguson's 36-month time assessment on the grounds that regulation § 8005.20(c)(6) denies petitioner due process and violates New York State Executive Law § 259-i(3)(f). Petitioner requests that this court annul 9 NYCRR § 8005.20(c)(6) and/or direct the New York State Division of Parole to reduce petitioner's time assessment to 18

months. The court denies petitioner's requests for the reasons set forth below.

The relevant facts are as follows. Petitioner in the instant action is an inmate in the care and custody of the Department of Correctional Services ("DOCS") and currently is incarcerated at Greene Correctional Facility. In 1998, petitioner was convicted of manslaughter in the first degree and sentenced to between six and eighteen years in prison. This sentence was to run concurrently with petitioner's remaining sentence from a conviction in 1992 for robbery and attempted murder. Petitioner was released to parole supervision on October 10, 2008. As one of the conditions of his release, petitioner was prohibited from associating or communicating with any person he knew to have a criminal record. Petitioner violated this condition by having cell phone contact "with a person known to him to have a criminal record." On November 30, 2008, petitioner was declared delinquent and charged with contact with a person known to have a criminal record. Petitioner was also charged with other violations as a result of complaints made by his ex-girlfriend that petitioner threatened her with violence.

A final parole revocation hearing was held on May 5, 2009. Prior to the commencement of the hearing, the parties negotiated a joint recommendation of an 18-month time assessment and the withdrawal of all charges – with the exception of the charge for contact with a person known to petitioner to have a criminal record – in exchange for a guilty plea for that charge. In accordance with the parties' plea agreement, ALJ Porter, the hearing officer assigned to preside over petitioner's revocation hearing, found petitioner guilty of contact with a person known to petitioner to have a criminal record and made a recommendation that petitioner be held for 18 months. However, ALJ Porter notified petitioner during this hearing that despite the ALJ and the parties' joint recommendation, it was the parole board and not the ALJ that made the final

determination, and that the parole board could make a decision holding petitioner to the rest of the time that he owed to parole supervision. Despite ALJ Porter's recommendation, New York State Board of Parole Commissioner James Ferguson rejected the 18-month time assessment and instead imposed a 36-month time assessment. In the section of the decision reserved for reasons for modification, Commissioner Ferguson stated his reasons for modification as "Violent I/O, prior att murder, prior rob out for only 1 ½ months." Petitioner filed an administrative appeal of Commissioner Ferguson's determination. The appeal was rejected on the grounds that petitioner waived his rights by failing to object at petitioner's final hearing and that the New York State Board of Parole retains exclusive authority to impose punishment against parole violators.

"It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature. If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail." *Weiss v City of New York*, 95 N.Y.2d 1, 4-5 (2000) (internal citations omitted). However, it is also true that a regulation is to be read, if possible, in a manner consistent with, rather than in opposition to, the governing statute. *See Knowles v Smith*, 54 N.Y.2d 259, 267 (1981).

The court finds that the regulation 9 NYCRR § 8005.20(c)(6) does not violate Executive Law § 259- i(3) as there is no language in that regulation that is out of harmony with the governing statute. New York State Executive Law § 259- i(3) sets forth the rights and procedural safeguards afforded to parolees in New York State. In this regard, § 259-i(3) mandates that parolees be given notice of the charges against them, a timely preliminary hearing and a final revocation hearing where they have an opportunity to be heard in person by a neutral

and detached hearing body with control over the parolee's liberty. See § 259-i(3)(c)(iii), (f). These hearings are conducted by hearing officers who have been appointed by the chairman of the state board of parole to conduct parole revocation proceedings. See §259-d(1). Section 259-d(1) further provides that "nothing in this article shall be deemed to preclude a member of the state board of parole from exercising all of the functions, powers and duties of a hearing officer upon request from the chairman."

In 1991, several changes were made to § 259- i(3)(f)(x). One of the changes was that the clause that read "when the presiding officer is a hearing officer, he may recommend to the board the dispositions in clauses (A), (B) and (C) of this subparagraph," was eliminated from the statute. Additionally, the sentence preceding the above-quoted clause was changed. Prior to 1991, that sentence read: "if the violator is ... restored to supervision, the board member may impose such other conditions of parole or conditional release as he may deem appropriate." After the 1991 amendments, that sentence was revised to read: "if the violator is ... restored to supervision, the presiding officer may impose such other conditions of parole or conditional release as he may deem appropriate, *as authorized by the rules of the board.*" (Emphasis added).

9 NYCRR §8005.20 is the New York State Division of Parole's regulatory adaptation of Executive Law § 259- i. Section 8005.20(c)(6) provides that if the presiding officer of a parole revocation hearing has determined that a parolee violated one or more conditions of his release, the presiding officer may fix a date for consideration by the board for re-release. In most cases, the presiding officer's decision is final and binding. However, § 8005.20(c)(6) specifies that when the parole violator is serving a sentence for felony offenses under articles 125, 130, 135 or

263 of the Penal Law, all decisions must be reviewed by a member or members of the Board of Parole (the "parole board") and a single member of the parole board must make the final decision that imposes a time assessment. Therefore, for violators who are serving sentences for the felony offenses enumerated above, such as the petitioner in this action, the final determination that imposes a time assessment is made by a single member of the parole board who is not bound by the hearing officer's recommendation.

Petitioner's argument that § 8005.20(c)(6) violates the governing statute § 259- i(3)(f)(x) because § 8005.20(c)(6) leaves the final determination of time assessment for parole violators serving sentences for certain specified felony offenses in the discretion of a member of the parole board, not with the presiding hearing officer is without merit. Petitioner argues that the 1991 amendment to § 259- i(3)(f)(x), which eliminated the clause "when the presiding officer is a hearing officer, he may recommend to the board the dispositions in clauses (A), (B) and (C) of this subparagraph," was meant to eliminate the hearing officer's advisory role and vested final sentencing authority in the presiding officer even when that officer is a hearing officer. However, although the language requiring a hearing officer to "recommend to the board the dispositions in clauses (A), (B) and (C)" was eliminated, the Legislators' addition of the language "as authorized by the rules of the board" to the preceding sentence left the power to control the final dispositions to the discretion of the parole board. In fact, if the court were to adopt the petitioner's argument, the court's decision would be in direct conflict with the 1991 amendment to § 259- i(3)(f)(x), which stated that the presiding officer's dispositions had to be "authorized by the rules of the board." Section 8005.20(c)(6) is indeed a rule of the parole board and there is nothing in the governing statute that prohibits the parole board from creating

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a rule giving a single member of the parole board the ultimate authority over the time assessments given to a specified category of felons. Accordingly, §8005.20(c)(6) remains in harmony with the statute even with the amendments made in 1991.

The court also finds that §8005.20(c)(6) does not violate petitioner's due process rights as a parolee. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court addressed the minimum requirements of due process afforded to parolees. The Court determined that parolees were entitled to "(a) a written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reason for revoking parole." *Id.* at 489.

In the instant case, petitioner was granted the due process afforded to parolees under *Morrissey*. The crux of petitioner's argument is that because he was not afforded the requirements of due process outlined above when the parole board member doubled his time assessment, his due process rights were violated. This argument is not persuasive. Under *Morrissey*, parolees are entitled to the due process protections outlined above only with regard to the board's determination to revoke petitioner's parole. These due process requirements do not extend to the parole board's determination of the time-assessment, which is made *after* the parole revocation hearing. In the instant case, petitioner was given written notice, disclosure of evidence, an opportunity to be heard, the right to confront and cross-examine witnesses and a

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written statement by the hearing officers as to the evidence and reasons relied on for revoking parole. Accordingly, petitioner's due process rights as a parolee were not violated.

Finally, the court finds that Commissioner Ferguson's decision to extend petitioner's time assessment to 36 months was not arbitrary or capricious. "The law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) ("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, Commissioner Ferguson's decision had a rational basis. In modifying petitioner's time assessment to 36 months, Commissioner Ferguson took into consideration the facts that petitioner had been incarcerated for attempted murder and robbery and that he had only been out on parole for one-and-a-half months. Accordingly, this court finds that Commissioner Ferguson's determination had a rational basis. It is therefore

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 3/7/11

Enter: PK
J.S.C.

CYNTHIA S. KERN
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).