

**Mayfield v Evans**

2011 NY Slip Op 31744(U)

June 24, 2011

Sup Ct, NY County

Docket Number: 402836/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
*J.S.C. Ginsberg*

PART 52

Index Number : 402836/2010  
**MAYFIELD, CLARENCE**  
VS.  
**EVANS, ANDREA**  
SEQUENCE NUMBER : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. 402836/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 02  
MOTION CAL. NO. \_\_\_\_\_

n 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.

**FILED**

JUN 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/24/11

CK  
CYNTHIA S. KERN *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION *J.S.C.*

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/ORDER

**FILED**

ANDREA EVANS, CHAIRWOMAN,  
NEW YORK STATE DIVISION OF PAROLE

JUN 28 2011

Respondent.

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

NEW YORK  
COUNTY CLERK'S OFFICE

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.....	_____
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____

Petitioner commenced this Article 78 proceeding to challenge the determination of respondent Andrea Evans, Chairwoman of the New York State Division of Parole ("Respondent" or "Division of Parole"), imposing a 36-month time assessment for violation of the terms of his parole. He challenged 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 requested 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. In a decision dated March 7, 2011, the

court denied petitioner's petition.

Petitioner now moves to reargue that part of his motion which argues that regulation § 8005.20(c)(6) violates Executive Law §§259-i(3)(f). On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). Petitioner here argues that the court misapprehended the law. The motion to reargue is granted and upon reconsideration, the court withdraws that portion of its decision addressing the issue of whether regulation § 8005.20(c)(6) violates Executive Law §§259-i(3)(f) and issues the following order and decision in its stead.

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 16, 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 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. Petitioner then commenced a petition challenging the determination of the Division of Parole. Among other requests, petitioner requested that the court declare § 8005.20(c)(6) in violation of the governing Executive Law – § 259-i(3)(f)(x) .

Before the 1991 amendment, § 259-i(3)(f)(x), read, in relevant part:

If the presiding officer is satisfied that there is a preponderance

of evidence that the alleged violator violated one or more conditions of release in an important aspect, he shall so find. When the presiding officer is a board member, he may (A) direct the violator's reincarceration and *fix a date for reconsideration by the board* for re-release on parole or conditional release, as the case may be; (B) as an alternative to reincarceration, direct the violator's placement in a parole transition facility for a period not to exceed one hundred eight days and subsequent restoration to supervision; or (C) direct that the parolee or conditional releasee be restored to supervision. Where a date has been fixed for the violator's re-release on parole or conditional release, as the case may be, the board or board members may waive the personal interview between a member or members of the board and the violator to determine suitability for re-release; provided, however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other such other basis as is authorized by the rules and regulations of the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board. If the violator is placed in a parole transition facility or restored to supervision, the board member may impose such other conditions of parole or conditional release as he may deem appropriate. *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.* (Emphasis added).

In 1991, the last clause of § 259-i(3)(f)(x) which 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 and § 259-i(3)(f)(x) read, in relevant part:

If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important aspect, he shall so find. The presiding officer may (A) direct the violator's reincarceration and *fix a date for consideration by the board* for release on parole or conditional release, as the case may be; (B) as an alternative to reincarceration, direct the violator's placement in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; or (C) direct that the parolee or conditional releasee be restored to supervision. Where a date has been fixed for the violator's re-release on parole or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine suitability for re-release; provided, however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other basis as is authorized by

the rules and regulations of the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board. If the violator is placed in a parole transition facility or 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).

Executive Law § 259-i(3)(f)(x) currently reads, in relevant part:

If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important aspect, he or she shall so find. For each violation so found, the presiding officer may (A) direct that the presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be restored to supervision; (B) as an alternative to reincarceration, direct the presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be placed in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; (C) in the case of presumptive releasees, parolees or conditional releasees, direct the violator's reincarceration and *fix a date for consideration by the board* for re-release on presumptive release, or parole or conditional release, as the case may be..." (Emphasis added).

9 NYCRR § 8005.20(c)(6) is the Division of Parole's regulatory adoption 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 presiding officer's recommendation.

“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). Moreover, “It is well settled that the Legislature may authorize an administrative agency to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation. In doing so, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes.” *Raffellini v State Farm Mutual Ins. Co.*, 9 N.Y.3d 196, 201 (2007)(internal citations omitted).

In the instant action, the court finds that § 8005.20(c)(6) is not in violation of Executive Law § 259-i(3)(f)(x) as there is no language in that regulation that is out of harmony with the governing statute. In this regard, the court finds that 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 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

