STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of CARLOS VARGAS,

Petitioner,

-against-

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

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2630 Index No. 2722-11

Appearances: Carlos Vargas
Inmate No. 07-A-0072
Petitioner, Pro Se
Fishkill Correctional Facility
Prospect Street, PO Box 1245
Beacon, NY 12508

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adam W. Silverman,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Fishkill Correctional Facility, commenced the instant CPLR Article 78 proceeding in the nature of mandamus to compel, for an order directing the respondent to grant him a parole interview. The petitioner is currently serving a determinate

term of ten years, to be followed by five years of post release supervision, resulting from a 2006 conviction of the crime of criminal possession of a controlled substance first degree, an A-1 felony. On October 5, 2009 the United States Immigration and Customs Enforcement Office issued to the petitioner an order of deportation to the Dominican Republic. As a consequence of the deportation order, the petitioner became eligible for consideration for Early Conditional Parole For Deportation Only ("ECPDO", hereinafter "deportation release") under Executive Law § 259-i (2) (d). In furtherance of its responsibilities under said section, the respondent has adopted Item 9305.02 of its Policy and Procedures Manual, which governs the protocol to be followed in such cases. According to the foregoing, where an inmate is subject to a deportation order, letters must first be sent to the sentencing court, the district attorney that prosecuted the defendant, and the inmate's defense attorney, requesting their recommendations with respect to whether the inmate should be released to deportation. In the case of A-1 felons, the inmate will not be permitted to appear before the Parole Board unless and until there is verification of receipt of responses from each of the foregoing parties (see Department of Corrections and Community Service ["DCCS"] Policy and Procedures Manual, Item 9305.02, Procedure ¶ II, B, 2, a, c).

On August 12, 2010 the respondent sent out a form letter addressed to the sentencing judge (Judge McLaughlin), the New York District Attorney and defense attorney John Beattie, seeking their recommendations with respect to deportation release for the petitioner.[1] The respondent never received a response to the form letter. Thereafter, on May 31, 2011

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[1]Although the form letter did not carry the address of each addressee, respondent indicates that it was mailed to each party at the proper address.

the respondent sent out separate letters individually addressed to each of the foregoing individuals, again requesting their recommendations. No response was received from any of the addressees, and accordingly, the respondent pursuant to Item 9305.02 of its Policy and Procedures Manual, found that the petitioner was ineligible to appear before the Parole Board for deportation release.

The petitioner argues that respondent's refusal to permit him to appear before the Parole Board is arbitrary and capricious and based upon criteria not mentioned in Executive Law § 259-i (2) (d).

The relief sought by petitioner is in the nature of mandamus to compel. 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 [3rd 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). Ordinary, "[w]hen a petitioner seeks relief in the nature of mandamus to compel, he or she is not aggrieved and, thus, the four-month statute of limitations for commencing a proceeding set forth in CPLR

217 (1) does not begin to run until an appropriate demand is made and refused" (Matter of Mitchell v Essex County Sheriff's Department, 14 AD3d 825, 825-826 [3rd Dept., 2005], citations omitted). It has also been held, however that a demand may not be unreasonably delayed and must be made within four months of when the right to make the demand arises (see Matter of Blue v Commissioner of Social Services, 306 AD2d 527, 528 [2nd Dept., 2003]; Matter of Thomas v Stone, 284 AD2d 627, 628 [3rd Dept., 2001]).

Executive Law 259-i (2) (d) recites as follows:

> "(d) (i) Notwithstanding the provisions of paragraphs (a), (b) and (c) of this subdivision, after the inmate has served his minimum period of imprisonment imposed by the court, or at any time after the inmate's period of imprisonment has commenced for an inmate serving a determinate or indeterminate term of imprisonment, provided that the inmate has had a final order of deportation issued against him and provided further that the inmate is not convicted of either an A-I felony offense other than an A-I felony offense as defined in article two hundred twenty of the penal law or a violent felony offense as defined in section 70.02 of the penal law, if the inmate is subject to deportation by the United States Bureau of Immigration and Customs Enforcement, in addition to the criteria set forth in paragraph (c) of this subdivision, the board may consider, as a factor warranting earlier release, the fact that such inmate will be deported, and may grant parole from an indeterminate sentence or release for deportation from a determinate sentence to such inmate conditioned specifically on his prompt deportation. The board may make such conditional grant of early parole from an indeterminate sentence or release for deportation from a determinate sentence only where it has received from the United States Bureau of Immigration and Customs Enforcement assurance (A) that an order of deportation will be executed or that proceedings will promptly be commenced for the purpose of deportation upon release of the inmate from the custody of the department of correctional services, and (B) that the inmate, if granted parole or release for deportation pursuant to this paragraph, will not be released from the custody of the United States Bureau of Immigration and Customs Enforcement, unless such release be as a result of

deportation without providing the board a reasonable opportunity to arrange for execution of its warrant for the retaking of such person.

(ii) An inmate who has been granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph shall be delivered to the custody of the United States Bureau of Immigration and Customs Enforcement along with the board's warrant for his retaking to be executed in the event of his release from such custody other than by deportation. In the event that such person is not deported, the board shall execute the warrant, effect his return to imprisonment in the custody of the department and within sixty days after such return, provided that the person is serving an indeterminate sentence and the minimum period of imprisonment has been served, personally interview him to determine whether he should be paroled in accordance with the provisions of paragraphs (a), (b) and (c) of this subdivision. The return of a person granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph for the reason set forth herein shall not be deemed to be a parole delinquency and the interruptions specified in subdivision three of section 70.40 of the penal law shall not apply, but the time spent in the custody of the United States Bureau of Immigration and Customs Enforcement shall be credited against the term of the sentence in accordance with the rules specified in paragraph (c) of that subdivision. Notwithstanding any other provision of law, any inmate granted parole from an indeterminate sentence or release for deportation from a determinate sentence pursuant to this paragraph who is subsequently committed to imprisonment in the custody of the department for a felony offense committed after release pursuant to this paragraph shall have his parole eligibility date on the indeterminate sentence for the new felony offense, or his conditional release date on the determinate sentence for the new felony offense, as the case may be, extended by the amount of time between the date on which such inmate was released from imprisonment in the custody of the department pursuant to this paragraph and the date on which such inmate would otherwise have completed service of the minimum period of imprisonment on the prior felony offense." (Executive Law 259-i [2] [d])

In addition, § 70.40, ¶ 1 (a) (v) recites:

> "Notwithstanding any other subparagraph of this paragraph, a person may be paroled from the institution in which he or she is confined [] for deportation pursuant to paragraph (d) of subdivision two of section two hundred fifty-nine-i of the executive law []." (Penal Law 70.40, ¶ 1 [a] [a])

The Court observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Matter of Rodriguez v Alexander, 71 AD3d 1354 [3rd Dept., 2010]; Barna v Travis, 239 F3d 169, 171 [2d Cir. 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir. 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept 2007]).

There is nothing within Executive Law § 259-i (2) (d) which confers upon an inmate a right to deportation release. Phrased differently, the receipt of a final order of deportation does not automatically entitle an inmate to such release (see People ex rel Borrell v New York State Board of Parole, 85AD3d 1515 [3d Dept., 2011]). An inmate's release is still within the discretion of the Parole Board (see Matter of Oyekoya v New York State Department of Parole, 276 AD2d 960, 960-961 [3d Dept., 2000], citing Matter of Ortiz v

New York State Bd. of Parole, 239 AD2d 52, 53, lv denied 92 NY2d 811). Nor does said section create a statutory right to appear before the Parole Board.

In the Court's view, the respondent retains the discretion to establish and implement reasonable procedures governing how it will carry out Executive Law § 259-i (2) (d). This has been realized through the adoption of DCCS Policies and Procedures Manual Item 9305.02. The Court discerns nothing unreasonable in requiring responses from the sentencing judge, district attorney and defense attorney as a predicate to scheduling an A-1 felon for an appearance before the parole board. For this reason, the Court finds that the petitioner has not established a clear right to the relief which he seeks. Nor has he demonstrated that the alleged duty sought to be enjoined is performance of an act commanded to be performed by law, purely ministerial and involving no exercise of discretion.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. The Court concludes that the petitioner has not demonstrated his entitlement to relief in the nature of mandamus to compel, and that therefore 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 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: November 9, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 5, 2011, Petition, Supporting Papers and Exhibits
2. Answer dated July 29, 2011, Supporting Papers and Exhibits
3. Petitioner's Letter dated August 7, 2011