

Matter of Conroy v Fischer

2011 NY Slip Op 33349(U)

September 30, 2011

Supreme Court, St. Lawrence County

Docket Number: 135918

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
JAMES CONROY, #08-A-5652,

Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #44-1-2011-0286.13
INDEX #135918
ORI # NY044015J**

-against-

BRIAN S. FISCHER, Commissioner,
NYS Department of Correctional Services,

Respondent.

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This proceeding was originated by the Petition For Writ of Habeas Corpus of James Conroy, verified on April 11, 2011 and filed in the St. Lawrence County Clerk’s office on April 15, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. In this regard petitioner asserted that for a variety of reasons he was denied the opportunity to participate in any early release program. More specifically, petitioner challenged the determination denying his application to participate in the DOCCS Shock Incarceration Program as well as the failure to grant him access to any avenue leading to a merit time allowance credit. The Court issued an Order to Show Cause on April 22, 2011 and has received and reviewed respondent’s Answer and Return, verified on June 24, 2011. The Court has also received and reviewed petitioner’s Reply and Supplemental Reply, filed in the St. Lawrence County Clerk’s office on July 11, 2011 and July 25, 2011, respectively.

On March 25, 2004 petitioner was sentenced in Supreme Court, New York County, to a controlling indeterminate sentence of 4 to 12 years upon his convictions of the crimes of Grand Larceny 1^o (three counts), Tampering With Physical Evidence (two counts), and Conspiracy 4^o.¹ Execution of the judgment of conviction/sentencing was apparently stayed pending appeal pursuant to Criminal Procedure Law §460.50. By decision dated July 15, 2008 the Appellate Division, First Department, modified the judgment of conviction/sentencing by vacating the tampering convictions and dismissing the two counts of the indictment underlying the tampering charges. The judgment of conviction/sentencing was otherwise affirmed. *People v. Conroy*, 53 AD3d 438, *lv den* 11 NY3d 735, *cert den* 129 S Ct 579. Petitioner's modified sentence, which remained a controlling indeterminate sentence of 4 to 12 years based upon the Grand Larceny 1^o convictions, was executed on October 17, 2008. On October 24, 2008 petitioner was received into DOCCS custody certified as entitled to 18 days of jail time credit. At that time DOCCS officials calculated the maximum expiration, parole eligibility and merit eligibility dates of petitioner's multiple sentences as October 5, 2020, October 5, 2012 and February 1, 2012, respectively.

Petitioner, who was born on February 21, 1940 and was thus 68 years old when he entered state custody, applied to participate in the DOCCS Shock Incarceration Program. Inmates who participate in the program “ . . . serve a period of six months in a shock incarceration facility, which shall provide rigorous physical activity, intensive regimentation and discipline and rehabilitation therapy and programing . . .” Correction

¹ According to DOCCS records, petitioner “ . . . ACTED AS COUNSEL & TRUSTEE TO A CORPORATION IN ORDER TO STEAL APPROXIMATELY \$29.5 MILLION.” (Crime and Sentence Information printout annexed to respondent's Answer and Return as part of Exhibit A).

Law §865(2). Upon successful completion of the shock incarceration program an inmate becomes immediately eligible for conditional release to parole supervision. *See* Correction Law §867(4). Eligibility for participation in the program, however, is statutorily limited to inmates less than 50 years of age (*see* Correction Law §865(1)) and petitioner's application to participate in the shock incarceration program was denied based upon his age.

Under the relevant provisions of Correction Law §803(1)(d)(iii) an eligible DOCCS inmate may earn a merit time allowance credit against the minimum period of his/her indeterminate sentence totaling one-sixth of the minimum period. "Such merit time allowance may be granted when an inmate successfully participates in the work and treatment program assigned pursuant to section eight hundred five of this article and when such inmate obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or performs at least four hundred hours of service as part of a community work crew." Correction Law §803(1)(d)(iv) (emphasis added).

By memorandum dated May 18, 2009 petitioner was advised by a correction counselor as follows:

"There are four ways to earn a merit time certificate. Complete a GED while being incarcerated, complete six months of a vocational program and earn one job title, complete ASAT [Alcohol and Substance Abuse Treatment programing] or complete 400 hours of outside clearance. School, vocational and ASAT are not program needs for you. Therefore the only way for you to meet merit time criteria is outside clearance - 400 hrs. Records indicate that you were denied outside clearance [apparently on March 25, 2009]. You are not allowed to reapply. There are no other options to earn merit time criteria available to you."

On February 1, 2010 petitioner filed an inmate grievance complaint designated Grievance No. GOV-15204/10. In his grievance complaint petitioner asserted, in relevant part, as follows:

“I am a non-violent offender with a clean prison record. Gouverneur Correctional Facility and New York State have discriminated against me because of my disabilities, my age, my education and my physical condition, by preventing me from utilizing any program for early release offered by New York State. The programs that have discriminated against me, in spite of repeated efforts to participate, include: - The Shock Incarceration Program, which allows participation by persons with disabilities; and - The programs and activities for earning Merit Time. These repeated denials . . . are violations of the Constitutions of The United States and New York State, The American with Disabilities Act and The New York State Human Rights Law, among others. Had I not been discriminated against because of my disabilities, my period of incarceration could have already have ended.”

In his grievance complaint petitioner specifically requested “. . . immediate release from incarceration . . .”

The Inmate Grievance Resolution Committee (IGRC) recommended that petitioner “. . . should not be discriminated against based on his age and education level. Grievant [petitioner] should be afforded the opportunity to earn Merit Time Credit.” By decision dated February 18, 2010 the Superintendent of the Gouverneur Correctional Facility disagreed with the IGRC response “. . . to the extent that the grievant’s requested action cannot be granted by the IGRC or by the Facility Administration. MERIT TIME eligibility and criteria are clearly elucidated in Directive #4790. This is clearly a departmental issue that cannot be addressed at the facility level.”

Petitioner took an administrative appeal from the superintendent’s determination and by decision dated April 28, 2010 the Inmate Grievance Program Central Office Review Committee (CORC) denied petitioner’s grievance as follows: “Upon full hearing

of the facts and circumstances in the instant case, and upon recommendation of Department's Counsel, the action requested herein is hereby denied. CORC upholds the determination of the Superintendent for the reasons stated. Contrary to the grievant's assertions, CORC has not been presented with sufficient evidence to substantiate any discrimination by staff. With respect to grievance appeal, he is not eligible for Shock program due to his age. CORC further notes that he is not eligible for Merit Time because he does not have an academic, vocational or substance abuse need and has been denied outside clearance."

To prevail on a challenge to the final results of a grievance proceeding an inmate "... must carry the heavy burden of demonstrating that the determination by CORC was irrational or arbitrary and capricious." *Frejomil v. Fischer*, 68 AD3d 1371, 1372 (citations omitted). See *Williams v. Goord*, 41 AD3d 1118, *lv den* 9 NY3d 812 and *Winkler v. New York State Department of Correctional Services*, 34 AD3d 993. For the reasons set forth below, the Court finds that petitioner has failed to carry such burden.

With respect to the shock incarceration program, the Court finds no allegation in petitioner's inmate grievance complaint or the petition herein suggesting that DOCCS officials failed to properly implement the under 50 age eligibility restriction set forth in Correction Law §865(1). Accordingly, the Court finds nothing irrational or arbitrary and capricious in the determination that petitioner's age statutorily precluded his eligibility to participate in the shock incarceration program.

As far as the availability of a merit time allowance credit is concerned, the Court finds nothing irrational or arbitrary and capricious in the CORC's determination that petitioner presented no academic, vocational or substance abuse needs. Indeed, nothing

in the inmate grievance complaint or the petition herein suggests otherwise. The Court likewise finds nothing irrational or arbitrary or capricious in the CORC's determination that petitioner was denied outside clearance and thus effectively precluded from performing service as part of a community work crew. Again, nothing in the inmate grievance complaint or petition herein suggests otherwise and petitioner has asserted no substantive challenge to the underlying determination denying him outside clearance.

The central thrust of the inmate grievance complaint and the petition herein is that the statutory provisions precluding petitioner's acceptance into the DOCCS Shock Incarceration Program (Correction Law §865(1)) and blocking his access to any avenue leading to a merit time credit allowance (Correctional Law §803(1)(d)(iv)) are either unconstitutional or in conflict with federal and/or state statutes. A challenge to the validity of a legislative enactment, however, is not cognizable in the context of a CPLR Article 78 proceeding. *See Press v. County of Monroe*, 50 NY2d 695. In this regard petitioner's reliance on *Council of the City of New York v. Bloomberg*, 6 NY3d 380 is misplaced. *Bloomberg* involved an Article 78 proceeding in the nature of mandamus to compel the Mayor of the City of New York to implement/enforce a local law and the respondent Mayor asserted a challenge to the validity of the local law as a defense. An action for declaratory judgment brought by the Mayor challenging the validity of the local law was apparently pending but, in the context of the CPLR Article 78 proceeding, the petitioning City Council argued that the local law should be enforced without considering the Mayor's defense on the grounds that the validity of the legislative enactment could not be decided in the Article 78 proceeding. The Court of Appeals found, however, that the theory advanced by the City Council ". . . would put the courts in the unacceptable

position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law, and would contradict the principle that ‘mandamus is never granted for the purpose of compelling the performance of an unlawful act.’ (Matter of *People ex rel Sherwood v. State Bd. Of Canvassers*, 129 NY 360, 370 (1891).” *Id* at 388. Accordingly, the Court of Appeals affirmed that the Mayor was entitled to raise the invalidity of the local law as a defense in the Article 78 proceeding. Such considerations are not in play in this proceeding.

Based upon all of the above, it is, therefore, the Decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: September 30, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court