STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ROBERT HULL ,
DIN #: 96A2263

Petitioner

-against-

DECISION AND JUDGMENT
Index No. 48149

TINA M. STANFORD, CHAIRWOMAN OF NYS DIVISION OF PAROLE,

Respondent

The Petitioner, herein, filed this Article 78 proceeding challenging his denial of parole. In response thereto, the Respondent submitted an answer and moved to dismiss alleging the Court lacks personal jurisdiction over the Respondent because the Petitioner effectuated service by certified mail as opposed to regular mail, as directed in the Order to Show Cause. In his reply, the Petitioner submits that Respondent's argument is one of form over substance. He notes that the mailing by certified mail provided greater assurance that the Respondent received the documents, and that he wanted proof that they were indeed received. There is no question that the Respondent's argument would be successful if the order to show cause had provided the reverse, to wit, that service was directed by certified mail and the inmate had only done regular mailing. Correnti v Suffolk County District Attorneys Office 34 A.D. 3d 578 (2d Dept 2006)

As a general rule, case law has consistently provided that pursuant to CPLR 403(d) "the Court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein." "Accordingly, the mode of service provided for in an order to show cause is jurisdictional in nature and must be literally followed (Citations omitted)" Correnti v Suffolk County District Attorneys Office *Supra* at page 580. In this case, however, the Court has the inherent authority to amend its Order to Show Cause, *nunc pro tunc,* when it could have originally ordered service by certified mail, and the petitioner

actually exceeded the Court's requirements concerning service upon the Respondent by sending the papers via certified, instead of regular, mail. Fagenson v First-York 86th Street Corp., 73 Misc. 2d 1069, 1070 (NY Co. Sup. Ct., 1973); Carlson v Harwood, 71 AD 2d 936,936(2d Dept., 1979) Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that the Order to Show Cause issued herein on March 20, 2014, is hereby amended nunc pro tunc, to allow service by certified mail in accordance with the terms therein, and it is

ADJUDGED that the Court has personal jurisdiction over the parties herein.

The Court now reviews the merits of the Petitioner's application. As acknowledged by the Respondent, Executive Law Section 259-c(4) required the Board of Parole to "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risks and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release and assist members of the Board of Parole in determining which inmates may be released to parole supervision". That law became effective October 1, 2011 and clearly applies in Petitioner's case.

The Respondent submits former Chairwoman, Andrea W. Evans', October 5, 2011 Memorandum providing instructions on how the Board of Parole should proceed in light of the legislative amendment is sufficient to serve as the written procedures of the Board pursuant to the aforementioned statute. The Petitioner claims the same is not sufficient. He submits that the Board needed to adopt written regulations and file the same with the Secretary of State. This issue is part of an outstanding appeal before the New York Court of Appeals, Montane v Evans, 116 A.D. 3d 197 (3d Dept 2014; lv. granted 23 NY 3d 903)

As noted in the Third Department decision, the Executive Law provision in effect before the 2011 amendment, referenced "guidelines" and now the Board is obligated to establish "written procedures" to be used in making parole release decisions. In the Third Department decision, it unanimously agreed that the amendment to Executive Law Section

259-c (4), does not require the promulgation of formal rules and regulations regarding the procedures to be utilized in making parole release determinations. The Court noted that the statutory amendment did not require the adoption of rules and regulations as opposed to other statutory provisions that did. In the concurring opinion of Justice Garry, he also agreed with the majority's determination that formal rule making was not required.

Regardless of whether the Third Department's unanimous determination on this issue is affirmed or overturned by the Court of Appeals, the Petitioner herein failed to preserve this argument in his administrative appeal and accordingly, cannot now request this Court to review the same. (Ex. F, Return)

Lastly, the Petitioner's argument that the Parole Board simply reviewed the severity of his underlying offenses and did not consider rehabilitative efforts is not supported by the Parole Board's decision. The Petitioner is serving 15 years to life for two (2) separate criminal incidents. He was convicted of Criminal Possession of a Weapon in the 2nd Degree, and Assault in the 1st degree for shooting one Eddie Johnson in the thigh. According to the papers, he stated to the victim "I told you I was going to get you mother fucker". While incarcerated on that charge, on April 5, 1996, the Petitioner punched a Correctional Officer while at Rikers Island and broke his jaw. For that incident, he was convicted of Assault 2nd degree. In his subsequent letter to the Board of Parole, the Petitioner accepted no responsibility for his actions. Since that time, on or about February 9, 2011, the Petitioner received a Tier III misbehavior report for violent conduct, fighting, and threats.

The Board of Parole, in making its determination, noted the foregoing incidents and further noted a review of the Petitioner's institutional record: "Including your goals and accomplishments in programming, your release plans including community resources that may be available to you, and your personal interview, including the rehabilitative efforts you have undertaken, and your needs for a successful community reintegration, and well as program completions, educational accomplishments, and having applied risk and needs principles and tools as well as all other relevant factors, it is the determination of this Board, having considered (1) whether there is a reasonable probability that if released, you will live

and remain at liberty without violating the law, (2) whether your release is compatible with the welfare of society, and (3) whether your release would so deprecate the seriousness of the offense as to undermine respect for the law. The Board notes both your accomplishments in programming and your institutional adjustment... it is the opinion of this panel that your parole be denied at this time...."(Ex. D, Return)

Despite the Petitioner's arguments, so long as the Board considers the factors enumerated in the statute it is "entitled....to place a greater emphasis on the gravity of the crime" (citing Montane v Evans) and others". Hamilton v New York State Division of Parole (2014 WL 3629320 (3rd Dept 2014). In Hamilton, inmate had an exemplary institutional record and his parole was still denied. Here, the Petitioner was found guilty of violent conduct as recently as 2011 while in the institutional setting.(Return, Ex. C) The Board having set forth a rational basis for its determination ends any further judicial intervention. Mttr of Russo v New York State Bd. Of Parole, 50 NY 2d 69, 77(1980); Mttr of Robles v Fischer, 117 AD 3d 1558(4th Dept., 2014)

The petition is in all respects denied and dismissed.

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

Dated: July 31 , 2014

Dennis F. Bender, Acting J.S.C