

Matter of Khweiss v Ledbetter
2014 NY Slip Op 33054(U)
September 16, 2014
Supreme Court, Franklin County
Docket Number: 2014-198
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
ALI KHWEISS, #12-R-1020,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2014-0100.18
INDEX # 2014-198
ORI #NY016015J**

-against-

PATRICIA LEDBETTER, Director,
Temporary Release Program,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Ali Khweiss, verified on February 24, 2014 and filed in the Franklin County Clerk's office on March 13, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the November 27, 2013 denial of his application to participate in the DOCCS Temporary Release Program (Work Release), as affirmed on administrative appeal on February 13, 2014. The Court issued an Order to Show Cause on March 26, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 29, 2014 and supported by the May 29, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply (undenominated) sworn to on June 27, 2014 and filed in the Franklin County Clerk's office on July 8, 2014.

On March 16, 2012 petitioner was sentenced in Supreme Court, Queens County, to a controlling indeterminate sentence of 5 to 15 years upon his convictions, after pleas, of the crimes of Enterprise Corruption (2 counts), Identity Theft 1^o (3 counts) and Criminal Possession of a Forged Instrument 2^o. He was received into DOCCS custody on

March 30, 2012 certified as entitled to 178 days of jail time credit. DOCCS officials have calculated his merit and regular parole eligibility dates as November 26, 2015 and October 1, 2016, respectively.

On November 5, 2013 petitioner applied to participate in the DOCCS Temporary Release Program (Work Release). By Decision dated November 29, 2013 petitioner's application was denied by the Temporary Release Committee (TRC) at the Bare Hill Correctional Facility based upon the nature of the offenses underlying his incarceration. The TRC's denial determination contained the following explanation:

“THE INSTANT OFFENSE OF ENTERPRISE CORRUPTION; IDENTITY THEFT INVOLVED YOU, WITH NUMEROUS CO-DEFENDANTS, FRAUDULENTLY OBTAINING CREDIT CARD NUMBERS TO MANUFACTURE COUNTERFEIT CARDS AND PURCHASE MERCHANDISE TO RESELL. THIS CREATED AN ESTIMATED LOSS OF \$13 MILLION. SERIOUS NATURE OF THIS OFFENSE DEEMS YOU AN UNSUITABLE WORK RELEASE CANDIDATE. SATISFACTORY ADJUSTMENT IS NOTED. SENTENCE STRUCTURE OF 5-15 YEARS IS ALSO NOTED.”

Upon administrative appeal Central Office Temporary Release affirmed the TRC denial determination based upon the nature of the crimes underlying petitioner's incarceration as well as community risk. The comments of the Central Office were as follows:

“YOUR I. O. [Instant Offense], ENTERPRISE CORRUPTION 2 CTS., IDENTITY THEFT 3 CTS., AND CPFI 2, INVOLVED THE LARGE SCALE THEFT OF MULTIPLE VICTIMS' IDENTITY AND THE PRODUCTION OF FORGED CREDIT CARDS AS PART OF A \$13 MILLION IDENTITY THEFT RING.

YOUR UNLAWFUL BEHAVIOR POSES CONTINUED RISK TO THE SAFETY AND FINANCES OF THOSE IN THE COMMUNITY, RENDERING YOU AN UNACCEPTABLE CANDIDATE FOR WORK RELEASE. ACCEPTABLE CUSTODIAL ADJUSTMENT IS NOTED.”

This proceeding ensued.

It is not disputed that the petitioner is an “eligible inmate” within the meaning of Correction Law §851(2) and was therefore entitled to apply to participate in the DOCCS Temporary Release Program. *See* Correction Law §855(1). Correction Law §855(4) provides that “[i]f the temporary release committee determines that a temporary release program for the applicant is consistent with the safety of the community and the welfare of the applicant, and is consistent with rules and regulations of the department, the committee, with the assistance of the employees or unit designated by the commissioner . . . shall develop a suitable program of temporary release for the applicant.” DOCCS regulations, in turn, have established a relatively complex, eleven item point scoring system to initially evaluate applications for temporary release. Six of the eleven point scoring items are based on criminal history and the remaining five on the applicant’s behavior while in DOCS custody. *See* 7 NYCRR §1900.4(e). The petitioner’s score was calculated as 48, which was sufficient for his application to be referred to the TRC for disposition.

7 NYCRR §1900.4(l)(2) directs the TRC, in making a temporary release decision, to center its attention on the applicant’s point score, their interview with the applicant, and “other methods” of evaluation, including recommendations of professional staff. “Committee members may also take note of those aspects of the applicant’s record not formally taken into account by the point system, such as the quality of the inmate’s performance in programs or on work assignment, performance in other correction systems where concurrent sentence has been served and where information is available, or the nature of prior disciplinary infractions.” *Id.* The regulation also directs that the committee take into account any other factors which they find to be significant. “In general, the applicant’s ability to profit from participation in temporary release should be weighed against whatever risk to the community or to the program would be posed by his

release.” 7 NYCRR §1900.4(l)(2). The TRC is enjoined by regulation to “. . . pay careful attention to the circumstances surrounding the offense [underlying the applicant’s incarceration] to determine as accurately as possible the nature of the offense.” 7 NYCRR §1900.4(l)(3). “Inmates should be denied temporary release if their presence in the community . . . would pose an unwarranted threat to . . . public safety . . .” 7 NYCRR §1900.4(l)(4).

An inmate’s participation in a DOCCS temporary release program is a privilege, not a right. *See* Correction Law §855(9). As such, judicial review of an administrative determination denying an application to participate in the program is limited to consideration of whether the denial determination violated any positive statutory requirement or constitutional right of the inmate and/or whether the denial determination was affected by irrationality bordering on impropriety. *See Lapetina v. Fischer*, 76 AD3d 722, and *Peck v. Maczek*, 38 AD3d 948.

Relying heavily on the March 20, 2013 decision of the Supreme Court, Sullivan County in *Rondos v. Ledbetter*, 39 Misc 3d 858, petitioner asserts that the TRC denial determination failed to specify why the nature of the crimes underlying his incarceration rendered him ineligible for work release inasmuch as the decision did not “. . . indicate in any manner that appellant is a threat to public safety.” The Court finds, however, that the TRC denial determination, as affirmed on a administrative appeal, sufficiently identified petitioner’s involvement in a multi-million dollar identity theft/forged credit card ring as posing a continued risk to the financial safety of the community. *See Crispino v. Goord*, 30 AD3d 874 and *Wallman v. Joy* 304 AD2d 996. In view of the obvious misgivings with respect to the trustworthiness of petitioner, occasioned by the nature of the crimes underlying his incarceration, the Court rejects any assertion that the work

release denial determination, as affirmed by administrative appeal, must specifically delineate how those crimes constitute a threat to the community.

It is noted that although the TRC referenced only “I/O NATURE” as the reason for its denial determination, both “I/O NATURE” and “COMUNTY [sic] RISK” were identified as reasons for affirming the TRC denial determination on administrative appeal. To the extent petitioner asserts, without citing any authority, that it was “arbitrary and capricious” to add the additional reason on administrative appeal, the Court rejects such assertion. In any event, the Court finds the reason cited by the TRC, together with its explanation setting forth more specific details of the nature of the crime underlying petitioner’s incarceration, would be sufficient to withstand petitioner’s challenge. Concerns with respect to the financial security of the community, in light of the nature of petitioner’s crimes as set forth in the TRC’s explanation, are obvious notwithstanding the committee’s failure to specifically state “community risk” in the decision.

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 16, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice