Matter of Babadzhanov v Ledbetter
2016 NY Slip Op 30277(U)
February 19, 2016
Supreme Court, Franklin County
Docket Number: 2015-881
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
AVRAM BABADZHANOV,#14-R-3216,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2015-0527.76
INDEX # 2015-881
ORI # NY016015J

-against-

PRISCILLA LEDBETTER, Director
NYS Department of Corrections and
Community Supervision Temporary
Release Programs,
Respondent.

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This a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Avram Babadzhanov, by his attorney Edward R. Hammock, Esq., verified on November 27, 2015 and filed in the Franklin County Clerk's office on December 2, 2015. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the April 29, 2015 determination of the Central Office Reviewer disapproving his application to participate in the DOCCS Temporary Release Program (work release), as affirmed on administrative appeal by the respondent on August 31, 2015. The Court has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on December 30, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated December 30, 2015. No Reply thereto has been received from petitioner.

On December 5, 2014[1] petitioner was sentenced in Supreme Court, Queens County, to a determinate term of 2 years, with 1½ years post-release supervision, upon his conviction of the crime of Attempted Criminal Possession of a Weapon 2°. He was received into DOCCS custody on December 19, 2014. At that time DOCCS officials calculated the maximum expiration and conditional release dates of petitioner's 2-year determinate term as December 2, 2016 and August 18, 2016, respectively.

On or about April 6, 2015 petitioner submitted an application (#1506618) to participate in the DOCCS Temporary Release Program (work release). The application was approved at the facility level and referred to the DOCCS central office for review. On April 29, 2015 the Central Office Reviewer issued a determination disapproving petitioner's temporary release application based upon the nature of the crime underlying his incarceration (weapons) and perceived community risk. The comments of the Central Office Reviewer were as follows:

> "INSTANT OFFENSE, ATT. CPW 2, INVOLVED INMATE BEING FOUND IN POSSESSION OF ILLEGAL FIREARMS AND LOADED MAGAZINES DURING THE EXECUTION OF A WARRANT. THE SERIOUS NATURE OF HIS INSTANT OFFENSE INVOLVING ILLEGAL WEAPONS POSES CONTINUED RISK TO THE SAFETY OF OTHERS, RENDERING HIM AN UNACCEPTABLE CANDIDATE FOR WORK RELEASE. ACCEPTABLE PROGRAM PARTICIPATION IS NOTED."

Petitioner took an administrative appeal from the Central Office Reviewer's disapproval determination, but that determination was affirmed by the respondent on

[1] The December 30, 2015 Letter Memorandum of Assistant Attorney General Fleury incorrectly identifies petitioner's sentencing date as February 5, 2014. In this regard it is noted that the copy of the Sentence and Commitment Order annexed to the respondent's Answer and Return as Exhibit A thereof is cut off at the left margin such that the sentencing date appears to read 2-5-14 rather than 12-5-14. The DOCCS Crime and Sentence Information printout, annexed to respondent's Answer and Return as part of Exhibit D thereof, however, confirms that the petitioner was sentenced on December 5, 2014.

August 31, 2015. In her determination on administrative appeal the respondent stated as follows:

> "IN ACCORDANCE WITH THE ESTABLISHED RULES AND REGULATIONS OF THE TEMPORARY RELEASE PROGRAM, I HAVE REVIEWED YOUR APPEAL OF THE CENTRAL OFFICE REVIEWER'S DECISION. AFTER CONSIDERING ALL FACTORS BOTH POSITIVE AND NEGATIVE, INCLUDING YOUR COMMENTS AND AVAILABLE RECORDS AND FACILITY AND PROGRAM ADJUSTMENT, I HAVE AFFIRMED THE DECISION OF THE CENTRAL OFFICE REVIEWER FOR THE REASONS STATED THEREIN."

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 point scoring system to initially evaluate applications for temporary release. Some of the point scoring items are based on criminal history and others on the applicant's behavior while in DOCCS custody. *See* 7 NYCRR §1900.4(e). Although petitioner's score is not discernable from the record, it was apparently sufficient for his application to be referred to the Temporary Release Committee (TRC) at the Franklin Correctional Facility for consideration.

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.

Citing the March 20, 2013 decision of the Supreme Court, Sullivan County, in *Rondos v. Ledbetter*, 39 Misc 3d 858, petitioner asserts that the respondent's determination affirming the Central Office Reviewer's disapproval of petitioner's temporary release application failed to adequately specify why the nature of the crime underlying his incarceration rendered him ineligible for work release. According to

petitioner, "[s]imply stating that the petitioner was an unacceptable candidate for work release because the serious nature of his offense posed a continued risk to the safety of others fell far short of establishing how his offense posed such a risk or why the nature of his offense rendered him ineligible for work release." The Court finds, however, that the respondent's determination, which incorporated by reference the reasons for disapproval stated by the Central Office Reviewer, sufficiently identified petitioner's possession of multiple illegal firearms/loaded magazines as constituting an ongoing risk to the safety of others. This Court rejects any assertion that the work release disapproval determination must further specifically delineate how petitioner's possession of multiple illegal firearms/loaded magazines at his home would constitute a threat to the community.

Petitioner also argues that the respondent's determination failed to adequately consider his personal history and character. In this regard the following is asserted in paragraphs 19 and 20 of the petition:

> "The petitioner is a 40 year old homeowner with a wife and two children. Through hard work and a determination to succeed, he acquired and currently owns five barber shops at which he employs 20 barbers. As the letters accompanying his administrative appeal attest, he is a pillar of the community and devotes whatever spare time he has to assisting recent immigrants to our country in learning English, providing day care for the children of widowed parents and remembering and honoring those people who lived and died in his native country. Considering that the petitioner has succeeded in virtually every endeavor that he has assumed since his arrival in the United States over a quarter of a century ago, there is little reason to doubt that he will be equally successful when he is permitted to participate in a work release program . . . Here, there is no indication from the Director's [respondent's] decision denying the work release application that any information regarding petitioner's background or prison record was even considered. If proper consideration of those highly significant factors had been given, it is certain that his application would have been granted, as the Superintendent of Franklin Correctional

> Facility had recommended. A conclusory and unsupportable finding that the petitioner's offense renders him an unacceptable candidate for work release is itself an unacceptable basis for arriving at such a decision."

In the context of discretionary parole release consideration, the Court notes that a Parole Board need not assign equal weight to each statutory factor it is required to consider nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197, *lv granted* 23 NY3d 903, *app dismissed* 24 NY3d 1052, *Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar the Court, drawing an analogy to the constraints on judicial review of a Parole Board's weighing process (as referenced in the preceding paragraph), finds no basis to conclude that petitioner's commendable pre-conviction record of entrepreneurship and community involvement and/or his post-conviction institutional adjustment were not afforded proper weight by the Central Office Reviewer and/or respondent. In this regard it is noted that in his administrative appeal to the respondent petitioner took full advantage of the opportunity to set forth all of the positive aspects of his community and institutional records. The respondent, moreover, referenced in her decision (albeit not in specific fashion) that petitioner's comments, along with available records and

facility/program adjustment, were considered. Respondent obviously concluded, however, that the community risk inherent in the temporary release of petitioner from DOCCS custody outweighed the positive aspects of his community/institutional records. The Court finds no basis to disturb that conclusion.

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: February 19, 2016 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Justice