

<b>Matter of Brown v Evans</b>
2012 NY Slip Op 30695(U)
March 9, 2012
Supreme Court, New York County
Docket Number: 402471/2011
Judge: Lucy Billings
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.  
*Justice*

PART 44

Index Number : 402471/2011  
BROWN, NATHANIEL  
vs.  
EVANS, ANDREA  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to for rule by respondent's determination  
petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2-3

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

*The court denies respondent's motion to dismiss the petition and grants the petition to the extent set forth, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a), 7803(b), 7804(d), 7806; N.Y. Exec. Law § 254-i(3)(f)(x).*

### UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/9/12

Lucy Billings, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

In the Matter of the Application of  
NATHANIAL BROWN,

Petitioner,

Index No. 402471/2011

For a Judgment Pursuant to Article 78 of  
the New York Civil Practice Law and Rules

- against -

DECISION AND ORDER

ANDREA EVANS, Chairwoman, NEW YORK STATE  
DEPARTMENT OF CORRECTIONS & COMMUNITY  
SUPERVISION,

Respondent

**UNFILED JUDGMENT**  
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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

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APPEARANCES: .

For Petitioner

Kerry Elgarten Esq.  
Legal Aid Society  
199 Water Street, New York, NY 10038

For Respondent

Michael Arcati, Assistant Attorney General  
120 Broadway, New York, NY 10271

LUCY BILLINGS, J.S.C.:

Petitioner, an inmate in the custody of the New York State  
Department of Corrections and Community Supervision (DOCCS)  
currently incarcerated at Orleans Correctional Facility,  
challenges respondent DOCCS Chairwoman's time assessment of 24  
months in additional incarceration after petitioner pleaded  
guilty to a violation of his parole conditions. C.P.L.R. §  
7803(3) and (4). Respondent moves to dismiss the petition on the  
grounds that it fails to state a claim that respondent's  
determination violated due process or Executive Law § 259-

i(3)(f)(x) or was arbitrary, without a rational basis, or unsupported by substantial evidence. C.P.L.R. §§ 3211(a), 7804(d). For the reasons explained below, the court denies respondent's motion to dismiss the petition, grants the petition to the extent of remanding the proceeding for speedy consideration by the New York State Board of Parole of petitioner's re-release on parole, and otherwise denies the petition. C.P.L.R. §§ 7803(3), 7806. See N.Y. Exec. Law § 259-i(3)(f)(x).

I. UNDISPUTED BACKGROUND

In 1996, petitioner was convicted of Rape in the First Degree and sentenced to an indeterminate term of 11 to 22 years. N.Y. Penal Law § 130.35. On August 11, 2010, he was released to parole supervision. On October 14, 2010, DOCCS declared him delinquent and charged him with multiple violations of his parole conditions.

At petitioner's Final Parole Revocation Hearing January 25, 2011, before an Administrative Law Judge (ALJ), petitioner pleaded guilty to one of the charges, entering the New York City Transit System without paying the fare, and admitted to being intoxicated when he committed that misconduct. He entered that plea on the understanding that the ALJ would recommend to the Board of Parole that a time assessment of 12 months be imposed, with the opportunity to attend an alternative substance abuse program for 97 days.

In a Parole Revocation Decision Notice dated January 25,

2011, the ALJ found, based on petitioner's plea, that petitioner entered the Transit System without paying the fare and was intoxicated when he did so. The ALJ further fulfilled the plea agreement by recommending to the Board of Parole that 12 months in additional incarceration be imposed, with the opportunity to attend an alternative substance abuse program for 97 days, and that, upon successfully completing the program, petitioner would be eligible for re-release to parole supervision sooner than in 12 months. N.Y. Exec. Law § 259-i(3)(f)(x). The ALJ based the finding of a parole violation on the admitted verified facts and the time assessment of 12 months with the alternative program on a review of petitioner's behavior and mitigating circumstances. See Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d 290, 298 (1st Dep't 2012). Nevertheless, in a Parole Revocation Decision Notice addendum dated January 31, 2011, respondent ordered that a time assessment of 24 months be imposed before petitioner would be eligible for re-release to parole supervision.

II. EXECUTIVE LAW § 259-i(3)(f)(x)

New York Executive Law § 259-i(3)(f)(ii) provides that a "revocation hearing shall be conducted by a presiding officer who may be a member [of] or a hearing officer designated" by the Board of Parole. Executive Law § 259-i(3)(f)(x) provides that, if that "presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he or she

shall so find." Regarding a parolee whom the presiding officer has found violated the conditions of release, § 259-i(3)(f)(x) authorizes the presiding officer to order one of three alternatives: (A) restoration to parole supervision; (B) placement in a parole transition facility up to 180 days, followed by restoration to parole supervision, or (C) reincarceration. When ordering reincarceration, the presiding officer is to "fix a date for consideration by the board for re-release on . . . parole." N.Y. Exec. Law § 259-i(3)(f)(x) (emphasis added).

This "consideration by the board for re-release," id., of course "refers to the future parole proceeding at the end of the term of time assessed," "after the time assessment has elapsed," not to the time assessment itself. Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 297. The time assessment determines the date by which the Board of Parole next will consider a parole violator for re-release on parole. 9 N.Y.C.R.R. § 8002.6(a); Suce v. Taylor, 572 F. Supp. 2d 325, 330 n.3 (S.D.N.Y. 2008). The Board's consideration of a former parole violator for re-release also follows a required personal interview. 9 N.Y.C.R.R. § 8002.6(d)(2)(iii).

Although Executive Law § 259-i(3)(f)(x) gives the presiding officer three options from which he "may" choose, the statute does not allow the officer to choose any other option. The enumerated list must be construed as intentionally excluding any options not listed. N.Y. Statutes § 240; Town of Riverhead v.

New York State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005); Walker v. Town of Hempstead, 84 N.Y.2d 360, 367 (1994); Locario v. State, 90 A.D.3d 547, 548 (1st Dep't 2001); New York City Council v. City of New York, 4 A.D.3d 85, 96 (1st Dep't 2004). The presiding officer "may" not choose an unlisted option such as a non-final decision imposing a time assessment, subject to a Board of Parole member's review and final decision fixing the time assessment. Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 297.

Thus, unless the Board of Parole designates one of its members as the presiding officer who conducts the hearing, N.Y. Exec. Law § 259-i(3)(f)(ii), Executive Law § 259-i(3)(f)(x) does not authorize a Board member to find a violation of release conditions, to order reincarceration, or to fix the date when the reincarcerated parole violator may be considered again by the board for re-release. At that point, of course, the Board members will determine when, if ever, the parole violator will be re-released before expiration of his sentence. Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 297.

Executive Law § 259-i(3)(f)(x) does authorize the Board of Parole's intervention in one other instance. "For the violator serving an indeterminate sentence who has been found by the department to have committed a serious disciplinary infraction while incarcerated, the department shall refer the violator to the board for consideration for re-release to community supervision." Respondent does not dispute that petitioner did

not fall in this category. While he was a violator serving an indeterminate sentence, DOCCS and the ALJ found that he had "violated one or more conditions of release," not that he had "committed a serious disciplinary infraction while incarcerated." N.Y. Exec. Law § 259-i(3)(f)(x). In the latter instance: "The Board shall retain the authority to suspend the date fixed for re-release" by the presiding officer at the hearing. Id. Notably, in that instance: "The board shall . . . require a personal interview between a panel of members of the board and the violator." Id.

Having designated the one instance when the Board of Parole may suspend a date fixed for re-release, specifically when the violator "committed a serious disciplinary infraction while incarcerated," Executive Law § 259-i(3)(f)(x) nowhere authorizes the Board or a member to adjust the date fixed by the presiding officer when a reincarcerated parole violator is to be considered for re-release. Yet respondent took precisely that action when, without a personal interview of petitioner, she extended that 12 months in additional incarceration and the alternative program of less duration to a time assessment of 24 months with no alternative.

### III. 9 N.Y.C.R.R. § 8005.20(c)(6)

Respondent took her action pursuant to DOCCS regulations, 9 N.Y.C.R.R. § 8005.20(c)(6). This provision first recognizes that, under Executive Law § 259-i(3)(f)(x):

A decision within these guidelines may be made by the presiding officer as a final and binding decision for all



categories of violators, other than those serving sentences for felony offenses under article 125, 130, 135 or 263 or section 255.25 thereof.

The excepted categories of offenses include homicide, kidnapping, and sex crimes, which comprise Rape in the First Degree of which petitioner was convicted. N.Y. Penal Law § 130.35. For violators convicted of these offenses, § 8005.20(c)(6) fails to recognize that, under the governing statute, "a hearing officer who is not a Parole Board member may 'fix' time assessments without Board approval, regardless of the underlying conviction." Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 296. Instead, the regulation requires that:

All decisions within these guidelines regarding alleged or adjudicated violators serving sentences for felony offenses under article 125, 130, 135 or 263 or section 255.25 thereof must be reviewed by a member or members of the Board of Parole and shall be decided as follows:

- (i) a single member of the board shall make the final decision that imposes a time assessment.

9 N.Y.C.R.R. § 8005.20(c)(6).

The regulation thus prescribes precisely what Executive Law § 259-i(3)(f)(x) proscribes: that a decision by the presiding officer who conducts the hearing imposing a time assessment is a non-final, non-binding decision subject to a Board of Parole member's review and final decision fixing the time assessment. Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 297. The statute, in contrast, does not subject the presiding officer's time assessment regarding violators convicted of any category of offense to a Board of Parole member's approval. Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 297.

IV. DISPOSITION

Here, the record demonstrates that petitioner was afforded a hearing that assured (1) a finding of a parole violation by the presiding ALJ "based on verified facts" and (2) the exercise of discretion by the ALJ, in fixing the period of 12 months before petitioner was to be considered for re-release on parole, "informed by an accurate knowledge of the parolee's behavior." Morrissey v. Brewer, 408 U.S. at 484; Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 298. Petitioner was afforded the opportunity to be heard, to show that he did not commit the multiple violations of his parole conditions with which he was charged, and in fact succeeded in convincing both DOCCS and the ALJ that he had committed only one such violation. Petitioner does not contend otherwise. Nor does he claim that he was denied an opportunity to show circumstances in mitigation such that the violation did not warrant revocation of his parole or, if it did, warranted a minimal time assessment. 9 N.Y.C.R.R. § 8005.19(b); Morrissey v. Brewer, 408 U.S. at 488; Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 298; DeFina v. New York State Div. of Parole, 27 Misc. 3d 170, 179-80 (Sup. Ct. Bronx Co. 2009). See For the People Theatres of N.Y. v. City of New York, 84 A.D.3d 48, 63 (1st Dep't 2011). Petitioner's claims pertain only to respondent's usurpation of the presiding officer's statutory authority. Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 297.

In fact, after hearing from both parties, reviewing the record, weighing the relevant information, and considering the

mitigating evidence, the ALJ detailed, with repeated emphases, the reasons for imposing a time assessment of 12 months and providing petitioner an opportunity to complete an alternative substance abuse program to qualify him for re-release sooner.

His criminal history is minimal. There are no criminal or violent acts since 1995. This is his first parole violation. He is now violated for a Theft of Services conviction ("farebeat"). There are no absconding charges. Although his underlying crime is horrendous, I believe that such behavior was an aberration of 15 years ago and will not be repeated. Moreover, parolee needs drug rehab (see special conditions) and admits to an alcohol problem.

V. Pet. Ex. 8, at 3. This analysis demonstrates that petitioner presented his position to a hearing officer who was fully cognizant of all the evidence presented, was capable of considering any mitigating factors in petitioner's favor, and articulated the reasons justifying the finding a of parole violation and the ALJ's time assessment and special conditions. Morrissey v. Brewer, 408 U.S. at 488-89; Matter of Edwin L., 88 N.Y.2d 593, 605 (1996); Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 299; People ex rel. Hacker v. New York State Div. of Parole, 228 A.D.2d 849, 850 (3d Dep't 1996). See People v. David W., 95 N.Y.2d 130, 139-40 (2000); For the People Theatres of N.Y. v. City of New York, 84 A.D.3d at 63. In all these significant respects, petitioner received a time assessment hearing comparable to the hearing afforded alleged and adjudicated parole violators convicted of offenses other than homicide, kidnapping, or sex crimes, to which he was entitled. N.Y. Exec. Law § 259-i(3)(f)(x); Mayfield v. Evans, \_\_\_ A.D.3d \_\_\_, 938 N.Y.S.2d at 300.

Again, petitioner nowhere contends that the hearing he

received before the ALJ in any way denied petitioner his constitutional rights to due process or his statutory rights under the Executive Law. He claims only that respondent treated the ALJ's decision based on that hearing as non-final and non-binding, disregarded that decision, and substituted another decision on completely different grounds, without any opportunity for petitioner to show that those grounds were unfounded and thus respondent's decision was irrational. See, e.g., ADC Contr. & Constr. Corp. v. New York City Dept. of Design & Constr., 25 A.D.3d 488, 489 (1st Dep't 2006); Auringer v. Department of Bldgs. of City of N.Y., 24 A.D.3d 162, 163 (1st Dep't 2005); Poster v. Strough, 299 A.D.2d 127, 142-43 (2d Dep't 2002).

Consequently, the court perceives no need for or benefit to be gained by remanding this proceeding to respondent for a new time assessment hearing where petitioner is afforded another "opportunity to address the ultimate decision-maker as to the appropriate time assessment in a manner consistent with the Executive Law as well as the state and federal Constitutions." Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 300. Unlike the petitioner in Mayfield v. Evans, \_\_ A.D.3d \_\_, 938 N.Y.S.2d at 293, the ALJ here considered and articulated all the mitigating factors in petitioner's favor and fully justified the ALJ's disposition. Since petitioner already has served more than the ALJ's time assessment of 12 months and has not been considered for re-release on parole by the Board of Parole, a new time assessment would delay his consideration for re-release even

longer.

V. CONCLUSION

For the foregoing reasons, the court denies respondent's motion to dismiss the petition and grants the petition to the following extent. The court vacates respondent's time assessment of 24 months and remands the proceeding to respondent (1) to impose a time assessment of 12 months from October 18, 2010, from which the assessment of 24 months originally ran, and (2) to assure the New York State Board of Parole's immediate consideration of petitioner for re-release on parole.

Because the court does not disturb the principal determination that petitioner violated the conditions of his parole, warranting a time assessment, and no party indicates any incompleteness in respondent's administrative record already presented to support its motion, the court also perceives no purpose in proceeding further in this forum with an answer to the petition. See C.P.L.R. §§ 409(b), 7804(f), 7806; Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educational Servs. of Nassau County, 63 N.Y.2d 100, 102-103 (1984); Camacho v. Kelly, 57 A.D.3d 297, 299 (1st Dep't 2008). If any party seeks to show such a purpose, that party may move, by an order to show cause, to restore this proceeding. Otherwise this decision constitutes the court's judgment granting the petition to the extent set forth, denying the remainder of the petition, and dismissing the

proceeding. C.P.L.R. §§ 7803(3), 7806; N.Y. Exec. Law § 259-  
i(3)(f)(x).

DATED: March 9, 2012

*Lucy Billings*

\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**UNFILED JUDGMENT**

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