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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
CESAR HOEPELMAN,#96-A-0642,
Petitioner,

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

-against-

BRIAN FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, and **CALVIN RABSATT,** Superintendent, Riverview Correctional Facility,

Respondents.

DECISION AND JUDGMENT
RJI #44-1-2012-0336.14
INDEX #138728
ORI # NY044015J

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Cesar Hoepelman, verified on May 1, 2012 and filed in the St. Lawrence County Clerk's office on May 9, 2012. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the respondents failure to place him in the DOCCS Sex Offender Counseling and Treatment Program (SOCTP). The Court issued an Order to Show Cause on May 15, 2012 and has received and reviewed respondents' Answer and Return, verified June 29, 2012, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on July 10, 2012. In response to its Letter Order of September 28, 2012, the Court has also received and reviewed an additional set of Exhibits (F through K), submitted on behalf of the respondents.

On January 16, 1996 and January 19, 1996 petitioner was sentenced in Supreme Court, New York and Bronx Counties, to a controlling aggregate indeterminate sentence of 13⅓ to 40 years upon his convictions of the crimes of Sodomy 1°, Attempted Sodomy 1°, Attempted Robbery 1°, Attempted Sexual Abuse 1° (3 counts) and Sexual Abuse 1° (all

in New York County) and Attempted Sexual Abuse 1°, Robbery 1° (2 counts) Sodomy 1°, Attempted Sodomy 1° and Sexual Abuse 1° (3 counts) (all in Bronx County).

Correction Law §622(1) provides, in relevant part, as follows:

> "The department shall make available a sex offender treatment program for those inmates who are serving sentences for felony sex offenses . . . In developing the treatment program, the department shall give due regard to standards, guidelines, best practices, and qualifications recommended by the office of sex offender management. The department shall make such treatment programs available sufficiently in advance of the time of the inmate's consideration by the case review team, pursuant to section 10.05 of the mental hygiene law, so as to allow the inmate to complete the treatment program prior to that time."

Mental Hygiene Law §10.05(b) initially provides that DOCCS, as an "agency with jurisdiction" (Mental Hygiene Law §10.03(a)), shall give notice to the Attorney General and to the Commissioner of Mental Health when " . . . a detained sex offender is nearing an anticipated release from confinement . . ." The statute also provides, in relevant part, that "[t]he agency with jurisdiction [DOCCS] shall seek to give such notice at least one hundred twenty days prior to the person's anticipated release . . ." It should be noted that the term "[r]elease" is defined, in relevant part, in Mental Hygiene Law §10.03(m) as " . . . release, conditional release or discharge from confinement, from community supervision by the department of corrections and community supervision . . ."

The underlying dispute in this proceeding centers around the timing of petitioner's placement in the SOCTP. According to the Program Criteria set forth in the DOCCS Sex Offender Counseling and Treatment Program Guidelines, "[f]ollowing best practices, sex offenders will be placed in the SOCTP as they get closer to their release date: eighteen (18) months to earliest release date [presumably merit parole or parole eligibility date] . . . for low risk participants and thirty six (36) months to conditional release date . . . for moderate and high risk participants." Petitioner has apparently been assessed as a

moderate to high risk for re-offending. According to respondents' answering papers, " . . .prison-based sex offender programing, since 2001, has always been offered as close as possible to the time the offender is expected to be released. This is because the program's focus is on providing the offender with the tools necessary to be successful upon release. This includes working with the offender to develop a discharge plan during the final phase of the program."

Although petitioner first became eligible for discretionary parole release on June 22, 2008, he will not reach his conditional release date until October 22, 2021. Thus, under the above-quoted Program Criteria set forth the DOCCS Sex Offender Counseling and Treatment Program Guidelines, petitioner will not be placed in the SOCTP until October 22, 2018 (36 months prior to his currently-computed conditional release date) at the earliest. In paragraph 14 of the petition it is alleged that petitioner has already " . . .appeared before two different Parole Board Panels [presumably in 2008 and 2010] and both board panels stated that the petitioner need to take the [SOCTP] program and as a direct result of the petitioners [sic] being unable to participate in this required and mandatory program due to the criteria of the [SOCTP] program he would have little hope of being released early on parole before he reaches his conditional release date . . ."

On March 13, 2012 petitioner filed an inmate grievance complaint (RV-10346-12) challenging the determination of DOCCS officials that he will not become eligible for placement in the SOCTP until he is within 36 months of his conditional release date. In his grievance complaint petitioner asserted " . . . that when the Department of Corrections implied that the inmate must wait until such time [36 months prior to conditional release date], it simply means that the inmate could not be expected to be released until serving two thirds of his sentence... Moreover, the inmate also asserts that he was held [by parole boards] twice already for the reason he needs to complete this program [SOCTP] before

he can be considered for parole. The department of corrections by implying that the inmate must wait would imply he has no expectation of being released until he has served two thirds of his sentence." The inmate grievance complaint specifically requested immediate placement in the SOCTP.

By Decision dated March 15, 2012 the Superintendent of the Riverview Correctional Facility denied petitioner's grievance, noting that "Central Office policy pertaining to the scheduling of inmates into the sex offender treatment program states that moderate to high risk participants are placed in this program within thirty six (36) months to their conditional release date. The grievant's C/R [conditional release] date is 10/22/2021." Although petitioner apparently took an administrative appeal from the superintendent's determination on or about March 22, 2012, it is asserted in paragraph nine of respondents' June 29, 2012 Answer and Return that petitioner's grievance appeal had not yet been heard by the Inmate Grievance Program Central Office Review Committee (CORC). Notwithstanding the foregoing, respondents did not assert an exhaustion defense in their Answer and Return or in any pre-answer motion. "Failure to exhaust administrative remedies is not an element of an article 78 claim for relief, but an affirmative defense which must be raised by respondent either in an answer or by preanswer motion or else be deemed waived." *Warwick v. Henderson*, 117 AD2d 1001 (citations omitted). *See Custom Topsoil, Inc. v. City of Buffalo*, 12 AD3d 1162 and *Greco v. Trincellito*, 206 AD2d 779. Accordingly, this Court will considered the merits, or the lack thereof, of petitioner's challenge.

To prevail on a challenge to the final results of a grievance proceeding an inmate " . . .must carry the heavy burden of demonstrating that the [final] determination . . . 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, this Court finds that petitioner has carried such burden.

The Court begins its analysis with an understanding of the benefits associated with respondents' policy goal of placing sex offenders in the SOCTP as close as possible to the times such offenders are expected to be released. The implementation of that policy goal, however, becomes problematic when a sex offender becomes eligible for discretionary parole release since the statutory power to determine which inmates may be so released resides with the independent New York State Board of Parole rather than DOCCS. *See* Executive Law §259-c(1) and *People v. Lankford*, 35 Misc 3d 418 at 422-423. Thus DOCCS, the agency responsible for implementing the SOCTP with the reasonable policy goal of placing sex offenders in the program as close as possible to the times such sex offenders are expected to be released, has no direct input in the determination as to when a particular sex offender will be granted discretionary parole release.

Petitioner has now appeared before three Parole Boards (April 2008, April 2010 and May 2012) for discretionary parole release consideration. On all three occasions petitioner was denied release with each board specifically noting, along with other factors[1], petitioner's lack of sex offender/therapeutic programing. More specifically, the April 2008 parole denial determination stated "YOU [petitioner] HAVE NOT BEEN INVOLVED IN SEX OFFENDER THERAPY THAT COULD GIVE YOU VALUABLE INSIGHT INTO YOUR SEXUAL RELATED PROBLEMS." The April 2010 parole denial determination stated " . . . YOU LACK THERAPEUTIC PROGRAMS PREPARING YOU FOR RELEASE." The May 2012 parole denial determination stated "YOU STILL HAVE NOT COMPLETED A MUCH NEEDED SEX OFFENDER PROGRAM." Petitioner will

[1] All three Parole Boards also noted the serious/disturbing nature of the crimes underlying Petitioner's incarceration as well as his problematic inmate disciplinary record.

presumably appear before three more Parole Boards (April 2014, April 2016 and April 2018) before the earliest date he might be placed in the SOCTP in accordance with the policy at issue in this proceeding.

This Court finds that the policy of not placing moderate and high risk sex offenders in the SOCTP program until they are within 36 months of their conditional release dates effectively presumes that such inmates will not be granted discretionary parole release prior to their conditional release dates whether or not they have completed the SOCTP. Such presumption may then become a self-fulfilling prophecy when a Parole Board denies discretionary parole release based, at least in part, upon the failure to complete sex offender programing. The potential negative impact associated with the implementation of the policy denying SOCTP placement until 36 months prior to conditional release date is particularly severe where, as in the case at bar, the sentence structure produces a significant length time (more than 13 years in this case) between an inmate's initial parole eligibility date and his/her conditional release date. While the Court recognizes that each of the three parole denial determination issued to date specifically noted, in addition to petitioner's lack of therapeutic/sex offender programing, the serious/heinous nature of the multiple crimes underlying his convictions as well as his less than steller prison disciplinary record, it remains irrational and/or arbitrary and capricious for the respondents to continue to exclude petitioner from participation in the SOCTP while he is denied discretionary release by Parole Board after Parole Board after Parole Board based, at least in part, upon the failure to complete sex offender programing. [2]

[2] The Court's conclusions should be considered as limited to the facts and circumstances of this case, where a more than 15-year gap exists between petitioner's initial parole eligibility date and his conditional release date and where petitioner has been denied discretionary release by three parole boards all citing, at least in part, his failure to complete sex offender programming. The Court has not been asked to consider, and expresses no opinion with regard to, the separate issue of whether or not moderate/high risk sex offenders must be offered an opportunity to participate in the SOCTP in advance of the earliest discretionary parole release dates. While it is not the proper role of the Court to offer specific suggestions as to how the interests moderate/high risk sex offenders to receive meaningful discretionary parole

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the respondents are directed to enroll petitioner in the SOCTP as soon is practicable.

Dated: December 31, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court

consideration may be balanced against the reasonable policy goal of placing sex offenders in the SOCTP as close as possible to the time such offenders are expected to be released, it does appear that some level communication between the Parole Board and DOCCS could help identify moderate/high risk sex offenders who might benefit from participation in the SOCTP earlier than 36 months in advance of their conditional release dates.