Matter of Liao v Tracy
2014 NY Slip Op 30115(U)
January 16, 2014
Sup Ct, St. Lawrence County
Docket Number: 142168
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

- X

In the Matter of the Application of
SHIH-SIANG SHAWN LIAO,#10-R-0674,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2013-0724.45
INDEX #142168
ORI # NY044015J

TERRENCE X. TRACY, Counsel,
NYS Board of Parole,
Respondent.

- X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Shih-Siang Shawn Liao, verified on October 4, 2013 and filed in the St. Lawrence County Clerk's office on October 8, 2013. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the respondent's alleged failure to comply with his Freedom of Information Law (FOIL) request. The Court issued an Order to Show Cause on October 10, 2013 and has received and reviewed respondent's Answer/Return, sworn to on November 25, 2013, as well as petitioner's Reply Affidavit, sworn to on December 20, 2013 and filed in the St. Lawrence County Clerk's office on December 30, 2013.

Petitioner purports to challenge " . . . the September 6, 2013 decision evading his request, under Freedom of Information Law (FOIL), for disclosure and/or production of new written procedures that should of [sic] been adopted by the NYS Board of Parole . . . pursuant to the 2011 Amendment of Executive Law §259-c(4)." That statute, the Court notes, was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall " . . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall

incorporate risk and needs principals to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[1]

By letter dated August 26, 2013 to Rande D. Nezezon, Facility Parole Officer, Riverview Correctional Facility, petitioner sought to obtain the new written procedures adopted by the New York State Board of Parole after the 2011 amendment of Executive Law §259-c(4). By memorandum dated September 6, 2013 P.O. Nezezon responded to petitioner's request (apparently deemed a "FREEDOM OF INFORMATION LAW (FOIL) REQUEST") as follows:

> "THIS OFFICER RECEIVED YOUR RECENT REQUEST FOR NEW WRITTEN PROCEDURES THAT HAVE BEEN ADOPTED BY THE NYS BOARD OF PAROLE SINCE 10-1-2011 AS A RESULT OF THE AMENDMENT TO EXECUTIVE LAW 259-C(4). THE BOARD OF PAROLE UTILIZES THE COMPAS RE-ENTRY AND ASSESSMENT REPORT AS A FACTOR IN RELEASE CONSIDERATION PURSUANT TO EXECUTIVE LAW 259-C(4). NUMEROUS OTHER FACTORS ARE CONSIDERED BY THE PAROLE BOARD INCLUDING RELEASE PLANS, CRIMINAL RECORD, PROGRAMS IN CORRECTIONS, SENTENCING MINUTES, LETTERS OF SUPPORT, OFFERS OF EMPLOYMENT, RESPONSES FROM THE SENTENCING JUDGE, DISTRICT ATTORNEY OR YOUR DEFENSE COUNSEL, DISCIPLINARY RECORD AND PERSONAL INTERVIEW DURING THE PAROLE HEARING. THE DECISION IN PARTEE V. EVANS, 2013 WL 3315108 [40 Misc 3d 896] (SUPREME COURT, COUNTY OF ALBANY JUNE 25, 2013 [)] ALSO RELATES TO THIS ISSUE."

P.O. Nezezon's response advised petitioner of his right to appeal the decision and by letter dated September 9, 2013 petitioner took an administrative appeal to the office of Terrence X. Tracy, Esq., Counsel's Office, NYS Board of Parole. Petitioner stated in his

---

[1] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall " . . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

administrative appeal that the response of P.O. Nezezon "evaded" the underlying FOIL request of August 26, 2013. Notwithstanding the foregoing, there is nothing in the petition, verified on October 4, 2013 and filed in the St. Lawrence County Clerk's office on October 8, 2013, to suggest that counsel's office had responded to petitioner's administrative appeal.

In this proceeding petitioner asserts that the September 6, 2013 response of P.O. Nezezon " . . . rather than approving or denying the disclosure [FOIL] request, instead . . . evaded such request by citing liberally one part of the parole statutes that had already existed prior to the 2011 Amendments, which contained a list of statutory factors under which the members of the Parole Board are required to take into consideration when making decisions for parole releases . . . But, it does not in any way provide an answer to what guidelines or what new written procedures, as required by Executive Law §259-c(4), are currently being used by members of the Parole Board in their decision-making process . . ." (Emphasis in original).

The respondent counters by asserting that the NYS Board of Parole has "long taken the position" that an October 5, 2011 memorandum issued by Andrea W. Evans, former Chairwoman of the Board (the Evans Memorandum), " . . . constitutes the written procedures adopted pursuant to Exec. Law §259-c(4)." In the Evans Memorandum, a copy of which is annexed to the respondent's Answer/Return as Exhibit E, the former Chairwoman writes, in part, as follows:

> ". . . [M]embers of the [Parole] Board had been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ('TAP'). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board

> were afforded training in July 2011 in the use of the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool [COMPAS] to understand the interplay between that instrument and the TAP instrument, as well as understanding what each of the risk levels mean."

The Evans Memorandum goes on to state ". . . that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider [Executive Law §259-i(2)(c)(A)] has not changed through the aforementioned legislation [amendment to Executive Law §259-c(4)] . . ." After specifically setting forth the statutory factors set forth in Executive Law §259-i(2)(c)(A), the Evans Memorandum concludes as follows:

> "Therefore, in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(I) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate towards effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations."

Respondent goes on to assert that in prior Article 78 proceedings initiated by petitioner the Evans Memorandum " . . . has been either submitted as an exhibit or otherwise discussed at length no less than five times." Indeed, in paragraph seven of his Affidavit in Support of Motion to Renew a Prior Order, sworn to on August 11, 2013 and submitted in connection with an Article 78 proceeding in this Court under Index #140947 (part of respondent's Exhibit B), petitioner acknowledged that former Chairwoman Andrea W. Evans " . . . had publicly contended that her written Memorandum ('The Evans Memorandum'), dated October 5, 2011, annexed here to as Exhibit B, should serve as a

'new written procedure' in accord with the statutory requirement of Executive Law §259-c(4) . . ." Thus, in this proceeding, respondent asserts that "[p]etitioner has been in possession of the document his FOIL request seeks since, at the very latest, 08/11/13. There is no denying that Petitioner understood the nature of the document at the time."

While it is clear that the issue of whether or not the Evans Memorandum can lawfully serve as the new "written procedures" referenced in the 2011 amendment to Executive Law §259-c(4) remains a concern for the petitioner, this Court has no doubt that petitioner is well aware of the New York State Board of Parole's repeatedly-stated position that the issuance of the Evans Memorandum represents the Board's compliance with the statutory mandate of amended Executive Law §259-c(4). This proceeding, moreover, wherein petitioner challenges respondent's alleged failure to comply with his FOIL request, is not the proper forum for resolving the issue of whether or not the issuance of the Evans Memorandum satisfies the statutory mandate[2]. The only issue before the Court in this proceeding is whether or not the response to petitioner's FOIL request was legally sufficient.

Although it is certainly arguable that the September 6, 2013 narrative response of P.O. Nezezon to petitioner's August 26, 2013 FOIL request was insufficient since it did not include a copy of the Evans Memorandum, this Court finds that any error in such response is harmless in view of the fact that petitioner is already in possession of a copy of the Evans Memorandum and is well-aware of the Board's position that the issuance of such memorandum constituted compliance with the statutory mandate set forth in amended Executive Law §259-c(4).

---

[2] It is noted that this issue has been considered and resolved - albeit unfavorably to petitioner - by Decision and Judgment of this Court dated, December 19, 2013, in the context in a separate CPLR Article 78 proceeding (St. Lawrence County Index No. 141882) brought by petitioner to challenge the November 2012 determination denying him discretionary regular parole release.

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: January 16, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court