

Matter of Cetta v Temporary Release Comm.

2016 NY Slip Op 30280(U)

February 4, 2016

Supreme Court, St. Lawrence County

Docket Number: 146498

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE
X

In the Matter of the Application of
DOMINIC CETTA, #14-R-1493,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2015-0640.25
INDEX # 146498
ORI # NY044015J

-against-

TEMPORARY RELEASE COMMITTEE
of Ogdensburg Correctional Facility,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Dominic Cetta, verified on September 14, 2015 and filed in the St. Lawrence County Clerk's office on September 23, 2015. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, is challenging the denial of an application to participate in the DOCCS Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program. The Court issued an Order to Show Cause on September 29, 2015 and has received and reviewed respondent's Answer and Return, including confidential Exhibits B and C, verified on November 17, 2015. The Court has also received and reviewed petitioner's Reply thereto, dated December 9, 2015 and filed in the St. Lawrence County Clerk's office on December 15, 2015.

On May 13, 2014 petitioner was sentenced in Supreme Court, Bronx County, as a second felony offender, to two concurrent determinate terms of 5 years each, with 3 years post-release supervision, upon his convictions of the crime of Attempted Criminal Possession of a Controlled Substance 3^o (two counts). The criminal acts underlying petitioner's two convictions were committed on separate dates (January 18, 2012 and May 31, 2012). On May 6, 2015 he appeared before the Temporary Release Committee (TRC)

at the Ogdensburg Correctional Facility in connection with an application (apparently submitted on behalf of the petitioner) to participate in the DOCCS Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program. By decision dated May 6, 2015 petitioner's application was denied by the TRC based upon concerns with respect to community risk and the nature of the crimes underlying petitioner's incarceration. The TRC's explanation for the denial determination was stated as follows: "DENIED BASED ON I/O [Instant Offense] WHICH INCLUDES POSSESSION OF LARGE AMOUNTS OF DRUGS AND RISK THAT IT PRESENTS TO THE COMMUNITY."

Petitioner took an administrative appeal from the TRC denial determination. According to respondent, his administrative appeal was received by DOCCS staff on May 15, 2015. Having received no determination on administrative appeal, petitioner commenced this proceeding on September 23, 2015 by filing his Petition in the St. Lawrence County Clerk's office. *See* CPLR §304(a). On October 16, 2015 - after this proceeding had been commenced - the TRC denial determination was affirmed by the DOCCS Central Office based upon the nature of the crimes underlying petitioner's incarceration, his recidivist criminal history and community risk¹. The Central Office affirmance determination contained the following comments:

"IN RESPONSE TO YOUR APPEAL, RAP REVIEWED, YOUR I/O, ATT CPCS 3 & ATT CPCS 3, INVOLVED YOU POSSESSING DRUGS. YOUR CRIMINAL HISTORY BEGAN IN 2000 & CONSISTS OF CONVICTIONS FOR CPW 4, ASSAULT 3, CRIMINAL MISCHIEF 4, ATT AGGRAVATED HARASSMENT 2, CRIMINAL POSSESSION LOADED FIREARM 3 & CPCS 5. YOU HAVE BEEN GRANTED PRIOR SANCTIONS OF ORDER OF PROTECTIONS, FINES, LOCAL

¹ Although this proceeding was commenced prior to the issuance of a final determination on administrative appeal, respondent waived the affirmative defense of exhaustion of administrative remedies by failing to interpose such defense in its answering papers. *See Custom Topsoil, Inc. v. City of Buffalo*, 12 AD3d 1162 and *Greco v. Trincellito*, 206 AD2d 779.

TERMS & NYS DOCCS TERM. YOUR FAILURE TO DETER YOUR CRIMINAL BEHAVIOR, DESPITE PRIOR SANCTIONS IMPOSED, AND YOUR WILLINGNESS TO CONTINUE TO HANDLE DRUGS, POSES THREAT & RISK TO THE SAFETY OF THOSE IN THE COMMUNITY. PRESUMPTIVE WORK RELEASE IS DENIED. PROGRAMMING & CUSTODIAL ADJUSTMENT ARE NOTED.”

The CASAT program was designed “. . . to prepare chemically dependant inmates for return to the community, to reduce recidivism by providing education and counseling focused on continued abstinence from all mood altering substances, and to encourage participation in self-help groups.” 7 NYCRR §1950.1. Under DOCCS regulations (7 NYCRR §1950.2) CASAT is a three-phase program with Phase 1 occurring in a DOCCS alcohol and substance abuse treatment correctional annex as defined in Correction Law §2(18). Phase 2 of CASAT involves “. . . a transitional period in a community reintegration component, which would include transfer to a work release facility for employment and placement in appropriate community-based programs . . .” 7 NYCRR §1950.2(b). Accordingly, prior to the commencement of Phase I of CASAT an inmate must be approved for work release or presumptive work release. 7 NYCRR §1951.1(c).

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 of 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. The scoring items are based on the inmate’s criminal history and his/her behavior while in DOCCS custody. *See*

7 NYCRR §1900.4(e). In making its temporary release determination the TRC is required by regulation to “. . . center its attention on the inmate’s score . . . and on their interview with the inmate as well as the other methods of evaluating inmates, including specific recommendations of the 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 . . . 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).

With the exception of the temporary release program points score system, screening for CASAT participation is the same as the screening for temporary release participation. 7 NYCRR §1951.1(c)(1). Ultimately, an otherwise eligible inmate may only be deemed unsuitable for presumptive work release based upon his or her crime of commitment, criminal history, custodial adjustment or outstanding warrants/detainers. 7 NYCRR §1951.1(c)(4).

An inmate’s participation in a DOCCS temporary release program, including by extension presumptive work release, is a privilege, not a right. *See Correction Law* §855(9). As such, a Court’s review of a decision denying an application to participate in such program is limited to a determination of whether the respondent violated any statutory requirement or constitutional right, or whether the denial determination was affected by irrationality bordering on impropriety. *See Lapetina v. Fischer*, 76 AD3d 722, *Herber v. Joy*, 61 AD3d 1142 and *Crispino v. Goord*, 31 AD3d 1022, *lv dis* 7 NY3d 854.

Citing 7 NYCRR §1900.4(a), petitioner argues that lawful procedure was violated since he was called to appear before the TRC without having filed an application to participate in any DOCCS temporary release program. The cited regulation provides, in relevant part, that “[i]nmates will apply for temporary release by filling out the

notification to temporary release committee form, indicating the type of temporary release they wish to apply for and their reasons for applying.” Respondent counters by asserting, in effect, that the provisions of 7 NYCRR §1900.4(a) are not applicable in the case at bar since the CASAT/presumptive work release screening procedures are separately set forth in 7 NYCRR Part 1951. The regulations under that part provide for a monthly, in-house screening for CASAT eligibility of time eligible inmates. *See* 7 NYCRR §1951.1(a). Without any mention of an inmate-filed application, 7 NYCRR §1951.1(c)(5) provides that “[t]he temporary release chairperson will schedule the inmate for an appearance before the facility temporary release committee. The committee will determine if the inmate is suitable for work release, or is suitable for presumptive work release approval contingent upon successful completion of the CASAT Phase I program component.”

Notwithstanding the foregoing, in paragraph 10 of his Reply petitioner asserts as follows:

“7 NYCRR §1951.1, is merely a screening procedure that applies to inmates who are more or less eligible for CASAT. Being eligible for CASAT does not require an appearance before the TRC. An inmate must appear before the TRC for a work release or presumptive work release consideration. An inmate cannot be considered for work release or presumptive work release without having applied for such temporary release program by submitting an application pursuant to 7 NYCRR §1900.4(a).”

While the issue of whether or not an inmate’s appearance before the TRC must be preceded by such inmate’s formal application to participate in a DOCCS temporary release program, even in the CASAT/presumptive work release context, is not definitively resolved by departmental regulations, the Court finds that under the circumstances of this case petitioner has effectively waived any challenge on this point. There is nothing in the

record herein to suggest that petitioner objected to his TRC appearance when he appeared before the committee on May 6, 2015. In addition, petitioner's administrative appeal from the TRC denial determination makes no mention of the application issue but, rather, focuses exclusively on the merits (or perceived lack thereof) of the TRC denial determination. Even in this proceeding, although petitioner requests judgment reversing the TRC determination and declaring such determination "null and void," he also requests "reconsideration" before a new TRC.

Turning to the merits of petitioner's challenge to the TRC denial determination, the Court finds that neither the TRC nor the DOCCS Central Office violated any statutory requirement or constitutional right in basing the CASAT/presumptive work release denial determination on the nature of the offenses underlying petitioner's incarceration and perceived community risk. The Court further finds no irrationality bordering on impropriety in the denial of petitioner's application for CASAT/presumptive work release based upon these factors. *See Lapetina v. Fischer*, 76 AD3d 722, *Herber v. Joy*, 61 AD3d 1142, *Collins v. Goord*, 24 AD3d 1048, *Dixon v. Recore*, 271 AD2d 778 and *Roper v. Recore*, 222 AD2d 911.

Petitioner specifically argues, in effect, that since the drugs he concededly possessed "were never distributed" he only posed a risk to himself and it was irrational to conclude that he posed a risk to the community. The Court finds, however, that the quantity and variety of drugs found in petitioner's residence on both January 18, 2012 and May 31, 2012 (see New York City Department of Probation Pre-Sentence Investigation Report annexed to respondent's Answer/Return as confidential Exhibit B) fully supports the community risk concern identified by the TRC. Finally, the Court finds no basis to overturn the TRC denial determination based upon petitioner's conclusory assertion that

members of the TRC made a “mockery” of his credentials/letters of recommendation and otherwise treated him “[i]n a rude, unprofessional and unethical manner . . .”

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 4, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice