State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 22, 2009 504763

In the Matter of BRIAN FOLKS,
Appellant,
v MEMORANDUM AND ORDER

GEORGE B. ALEXANDER, as Chair of the New York State Division of Parole,
Respondent.

Calendar Date: November 24, 2008

Before: Cardona, P.J., Mercure, Malone Jr., Kavanagh and Stein, JJ.

Brian Folks, Coxsackie, appellant pro se.

Andrew M. Cuomo, Attorney General, Albany (Julie A. Sheridan of counsel), for respondent.

Appeal from a judgment of the Supreme Court (Connolly, J.), entered April 18, 2008 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Board of Parole revoking petitioner's parole.

In 1993, petitioner was convicted of manslaughter in the first degree and sentenced to a term of imprisonment of 7 to 21 years. He was conditionally released to parole supervision in February 2006 and declared delinquent approximately five months later. Ultimately, he pleaded guilty to failing to report to his parole officer, and the Administrative Law Judge (hereinafter ALJ) recommended a 12-month time assessment. The Board of Parole thereafter revoked petitioner's parole and imposed a 24-month

hold. Supreme Court dismissed petitioner's subsequent application to review the Board's determination, prompting this appeal.[1]

Petitioner's primary contention on appeal is that the Board erred in modifying the ALJ's recommended time assessment and imposing a 24-month hold. We cannot agree. It is well settled that any recommendation made by the ALJ is advisory in nature and that the ultimate authority to reincarcerate petitioner and fix a date for his release lies with the Board (see Matter of Santiago v Dennison, 45 AD3d 994, 995 [2007]; Matter of Otero v New York State Bd. of Parole, 266 AD2d 771, 772 [1999], lv denied 95 NY2d 758 [2000]). The record here reflects that petitioner was aware that the ALJ's recommendation was not binding on the Board, i.e., there were "no guarantees" that the Board would follow that recommendation (see People ex rel. Tyler v Travis, 269 AD2d 636, 637 [2000]). Moreover, we do not view the penalty imposed as either harsh or an abuse of discretion. Petitioner's remaining contentions have been examined and found to be lacking in merit.

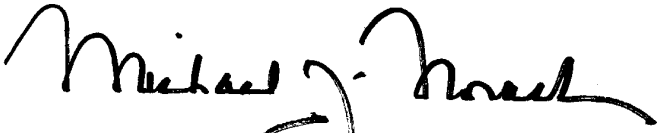
Cardona, P.J., Mercure, Malone Jr., Kavanagh and Stein, JJ., concur.

---

[1] Respondent concedes that petitioner's administrative remedies were deemed exhausted when his administrative appeal was not decided within the relevant time period (see Matter of McCloud v New York State Div. of Parole, 277 AD2d 627, 628 n 2 [2000], lv denied 96 NY2d 702 [2001]).

ORDERED that the judgment is affirmed, without costs.

ENTER:



Michael J. Novack
Clerk of the Court