October 2019

Decision in Art. 78 proceeding - Bailey, Rodney (2016-08-17)

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
RODNEY BAILEY, 81-A-1110,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

NOTICE OF ENTRY

Index No. 973-16

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PLEASE TAKE NOTICE that the within is a true copy of the Decision and Judgment in this action entered in the Office of the County Clerk of Albany County on August 23, 2016.

Dated: Albany, New York
August 25, 2016

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

RODNEY BAILEY,

Petitioner,

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

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

DECISION AND JUDGMENT

Index No. 973-16
(RJI No. 01-16-ST7742)

APPEARANCES:

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Hartman, J.

In this CPLR Article 78 proceeding, petitioner Rodney Bailey seeks to vacate a determination of respondent Board of Parole (Board) that denied him discretionary release to parole supervision. Petitioner argues that (1) the Board relied on inaccurate information, (2) the Board improperly considered opposition to his release from the New York City Police Benevolent Association, (3) the Board placed undue emphasis on the nature of his crime, (4) the Board did not properly consider his risk level as assessed by the COMPAS instrument, and (5) the Board's determination exhibits irrationality bordering on impropriety. Petitioner's rehabilitative achievements are commendable, but because the Board considered the requisite factors and its determination is not affected by an error of law, the Court is constrained to deny the petition.

Background

Petitioner is currently serving a sentence of 25 years to life of imprisonment for the second degree murder of a police officer in 1980. In January 2015, petitioner appeared before the Board for the fourth time. Petitioner submitted a parole packet that included letters of reasonable assurance from community organizations, letters of support from acquaintances and family, and records of his degrees and efforts on behalf of others. At the interview, petitioner took responsibility for his heinous crime

and avowed that he was a changed man looking to make a positive contribution to society. The commissioners questioned him briefly on the nature of his crime, his post-release plans, and his positive disciplinary history. At the conclusion of the interview, a commissioner stated to petitioner that the Board had to "consider everything, including any opposition that exists to your release. . . . We do see that, at least, since 2012, you definitely have been making a difference. . . . I see all the academics, but then the other thing we look at is the disciplinary. Clearly from 2012 on, you're turning a different leaf." After the interview, the Board denied parole and ordered a 24-month hold. The decision states that petitioner's "release would be incompatible with the welfare of society" and would "undermine respect for the law." The decision refers to the details of petitioner's criminal history, states that all statutory factors have been considered, and notes petitioner's lack of disciplinary violations since 2012 and completion of GED and two associate's degrees. Petitioner's administrative appeal was denied in December 2015. His next appearance before the Board will be in November 2016.

Legal Standard

"Any action by the [B]oard . . . shall be deemed a judicial function and shall not be reviewable if done in accordance with law" (Executive Law § 259-i [5]). "Absent failure by the Board to comply with the mandates of Executive Law article 12-B, '[j]udicial intervention is warranted only when

there is a "showing of irrationality bordering on impropriety"" (*Matter of Hamilton v N.Y. State Div. of Parole*, 119 AD3d 1268, 1269 [3d Dept 2014], *quoting Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000] [alteration in original]).

According to Executive Law § 259-i (2) (c) (A), the Board does not grant parole as a reward for good behavior, but when "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." The Board must consider, among other things, the inmate's institutional record, release plans, crime victim statements, criminal record, and "the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement" (Executive Law § 259-i [2] [c] [A]). The Board must also consider the COMPAS risk assessment instrument (*see* Executive Law § 259-c [4]; *Matter of Rivera v N.Y. State Div. of Parole*, 119 AD3d 1107, 1109 [3d Dept 2014]) and any earned eligibility certificate (*see* Correction Law § 805; *Matter of Singh v Evans*, 107 AD3d 1274, 1275 [3d Dept 2013]). The Board may not "rely on factors outside the scope of

the statute in reaching its decision" (*Matter of Duffy v N.Y. State Dept. of Corr. & Community Supervision*, 132 AD3d 1207, 1209 [3d Dept 2015]).

When the Board denies parole it must inform the inmate "of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms" (Executive Law § 259-i [2] [a] [i]). However, "[t]he Board need not enumerate, give equal weight or explicitly discuss every factor considered and [is] entitled . . . to place a greater emphasis on the gravity of [the] crime" (*Matter of Leung v Evans*, 120 AD3d 1478, 1479 [3d Dept 2014] [internal quotation marks omitted], *lv denied* 24 NY3d 914 [2015]).

Analysis

Here, the Board's determination is not arbitrary and capricious and does not exhibit irrationality bordering on impropriety. The record indicates that the Board considered the necessary factors, including the COMPAS instrument, and petitioner's institutional record, letters of support, and release plans (*see Matter of Romer v Dennison*, 24 AD3d 866, 868 [3d Dept 2005], *lv denied* 6 NY3d 706 [2006]). The determination makes specific reference to petitioner's associate's degrees and good disciplinary record. The Board did not place unlawful emphasis on petitioner's crime; it was entitled to weigh petitioner's crime more heavily than other factors, even to the extent of denying parole based on the nature of the crime alone (*see Matter of Hamilton*, 119 AD3d at 1272). And the Board's determination, "while less detailed than it

might be, is not merely 'conclusory' and so does not violate Executive Law § 259-i (2) (a) (i)" (*Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778 [2008]).

The record contains no indication that the Board relied on inaccurate information regarding the number of shots petitioner fired or contained in the COMPAS instrument.[1] Regarding the number of shots fired, whether petitioner fired one shot or six appears to be insignificant in light of his admission that he shot and killed the police officer victim. Moreover, when a commissioner asked petitioner how many shots were fired, petitioner referred the commissioner to information in his parole file. And the sentencing minutes petitioner has provided to the Court do not unequivocally demonstrate that six shots were not fired, but that there was some dispute as to the number of shots fired. Regarding the COMPAS instrument, petitioner contends that it incorrectly reports that he had been charged as a juvenile for a felony-type offense. Assuming without deciding that the information contained in the COMPAS was incorrect, the risk instrument assigned him scores of 1 ("low") for "risk of felony violence," "arrest risk," and "abscond risk." In sum, the Board did not expressly rely on any of the allegedly inaccurate information, nothing in the record indicates they relied on inaccurate information, and the claimed

[1] To the extent that petitioner is arguing that it only *appears* that he ran behind a building when fleeing the police officer, and that the Board improperly assumed that he did *in fact* run behind the building, such argument is meritless. The distinction is immaterial here, and petitioner has admitted the essential facts of the narrative contained in the parole file.

inaccuracies appear to be of marginal relevance to the Board's determination (*see Mercado v Evans*, 120 AD3d 1521, 1522 [3d Dept 2014]).

The Court rejects petitioner's argument that the Board's determination must be reversed for improperly relying on letters generated by a police officers' union. The Board's determination does not indicate that it relied on improper matters, and it has not submitted any community opposition letters to the Court. But even assuming letters received by the Board contained inaccuracies or were inflammatory, the Board would be permitted to consider them for what they are worth. In analogous circumstances, the Appellate Division, Third Department, upheld the Board's determination where petitioner contended that victims' statements interjected inappropriate matters (*see Matter of Duffy*, 132 AD3d at 1209). The Board need not "expressly disavow in its decision inappropriate matters interjected by victims or . . . somehow quantify the extent or degree to which it considered appropriate parts of victims' statements while disregarding other parts in its overall analysis of the statutory factors" (*id.*). The Board will be presumed not to have relied on inappropriate matters unless "the Board's decision indicat[es] that it was influenced by, placed weight upon, or relied upon any improper matter, whether in the victim's family statements or otherwise" (*id.*).

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to respondent's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules respecting filing and service.

Dated: Albany, New York
August 17, 2016

Denise A. Hartman
Acting Supreme Court Justice

Papers Considered

1. Petition, with Exhibits A–B, letter dated 12/9/12 re. Pre-Sentence Report, Parole Packet, Hearing Transcript, COMPAS Instrument, Administrative Appeal, Administrative Appeal Decision Notice
2. Answer, with Exhibits A–J
3. Memorandum of Law in Support of Answer