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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, ANTHONY J.
ANNUCCI, ACTING COMMISSIONER
and TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,

Affirmation in Reply

Index No. 2020-54062

Judge Christi J. Acker

Respondents

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

MARTHA RAYNER, attorney for the petitioner, _____, hereby
affirms that:

1. I am an attorney duly licensed in the State of New York. I am associated with Lincoln Square Legal Services, Fordham University School of Law's clinic law office. I represent Mr. _____ in the above-captioned matter and I make this affirmation in reply to the Respondents' January 6, 2021 Answer and Return to _____ s December 4, 2020 Petition for judgement pursuant to Article 78 of the Civil Practice Law and Rules.
2. Petitioner replies to Respondents' Verified Answer and Return as follows:

I. Respondents Erroneously Contend that the Parole Board May Ignore the Text of its Own Regulation Requiring that a Denial Decision Address How the Applicable Factors Were Considered

3. As argued in the Petition at Point I, the 2017 revision of 9 N.Y.C.R.R. §8002.3 extended the Board’s duty to explain the reasons for denying parole. Rather than merely explaining the factors in support of denial, the Board must now address how the applicable factors were addressed, whether in support or against denial of parole. Pet. at 4. Yet, without reasoning or authority in support, Respondents dismiss this positive law requirement as “a novel legal theory.” Response at ¶31. But, that is precisely what the regulation requires. The regulation requires that “[r]easons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case.” The 2017 regulation placed a greater burden of explanation upon the Board. Pet. at 4-5. Respondent also argues that its interpretation of the regulation must be given deference, but does not provide an alternate interpretation of the regulation. Response at ¶31.
4. In another section of its response, Respondents cite two cases that pre-date adoption of the 2017 regulation for the proposition that the Board “is not required to state each factor it considers.” R. at ¶25 (citing *Comfort v New York State Division of Parole*, 68 A.D.3d 1295 (3d Dept. 2009) and *Hamilton v New York State Division of Parole*, 119 A.D.3d 1268 (3d Dept. 2014)). Like the Appellate Division, Second Department cases cited in the Petition, these cases are not dispositive since they were decided before the Board’s adoption of the revised 9 N.Y.C.R.R. §8002.3. Pet. at 5.
5. Similarly, Respondents cite nine cases ostensibly in support of its conclusory claim that “[t]he Board set forth in adequate detail the reasons for its denial of the inmate’s request for

release.” Response at ¶18. Yet, all but one of the cases were reviewing denials of parole that took place before adoption of the 2017 regulation. The one case that was reviewing a 2018 parole denial, *Schendel v. Stanford*, 185 A.D.3d 1365, 1365–66 (3d Dept 2020), brought by petitioner *pro se*, stated that “the Board was not required to give equal weight to—or expressly discuss—each of the statutory factors” *Id.* at 1366. Yet, in stating such, the court relied on and quoted *Espinal v. New York State Bd. of Parole*, 172 A.D.3d 1816, 1817 (3d Dept 2019), that reviewed a denial that took place before adoption of the 2017 regulation.¹ In addition, there is no indication in the *Schendel* decision that the *pro se* petition raised or the court addressed the 2017 revision to 9 N.Y.C.R.R. §8002.3. In sum, Respondents do not cite authority interpreting the regulation to require anything less than what the regulatory text requires.

6. The Board did not fulfill its enhanced duty to explain how it addressed the numerous factors applicable to Mr. [REDACTED] and thus did not adhere to the law. Pet. at 7-12. This violation of positive law requires annulment of the denial and a *de novo* review. See *Hamilton v. New York State Div. of Parole*, 119 A.D.3d 1268, 1269 (3d Dept 2014) (“The Court of Appeals has long interpreted that language—in both current and prior statutes—to mean that “so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts.”) (*citations omitted*).

II. A Denial Decision Citing Release as Incompatible with the Welfare of Society is a Departure from COMPAS Low Risk Scores

7. Petitioner came before the Board with low risk scores for re-arrest, felony violence and absconding, yet the Board denied parole based solely on incompatibility with the welfare of society without explaining its departure from the low risk scores. Respondents erroneously

¹ 9 N.Y.C.R.R. §8002.3 became effective on September 27, 2017. The denial in *Espinal* was in June of 2017.

contend that the Board's duty to explain a denial in the face of low risk scores is only required when parole is denied based on a reasonable probability of violating the law. Respondents ignore the plethora of cases finding that a denial that includes incompatibility with the welfare of society as a basis for denial is also inconsistent with low COMPAS risk scores. *Cf* Pet. at 15-20 to Response at ¶33). Instead, Respondents cite one Supreme Court case, *Scharff v DOCCS*, 2019-53460 (Sup. Ct, Dutchess Cty. 2020) ([FORMAN, J.], which appears to single out a denial based on the standard of reasonable probability of not living and remaining at liberty without violating the law as the only parole release standard that would be inconsistent with low COMPAS risk scores. *Id.* at 5-6 (“A reading of the parole interview transcript and the Board’s decision indicates that the decision denying release to parole was not impacted by a departure from a COMPAS scale. The Board did not find a reasonable probability that Petitioner would not live and remain at liberty without violating the law. Rather, the Board decided, despite low risk scores, that release would be inappropriate under the other two statutory standards.”).

8. This holding, however, does not adhere to the weight of authority finding otherwise. *See Matter of Coleman* 157 A.D.3d 672, 673 (2d Dep’t 2018) (citing low COMPAS risk scores as one factor that did not provide “support” for the Board’s decision that “there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law, are without support in the record.”); *Phillips v. Stanford*, 52579/19, at 4 (Sup. Ct. Dutchess Cty. 2019) (finding low COMPAS risk and needs scores “directly contradicted” the Board’s finding that discretionary release would not be compatible with the welfare of society, and thus the Board was “required

to articulate with specificity the particular scores in petitioner's COMPAS assessment from which it was departing and provide an individualized reason for such departures."); *Voii v. Stanford*, No. 2020-50485, at 5-6 (Sup. Ct. Dutchess Cty. 2020) (rejecting as "flawed" the Board's argument that it need not explain its departure because it did not depart from a finding that the petitioner was likely to reoffend, only that petitioner's release was incompatible with the welfare of society and would deprecate the seriousness of the offense, and reiterating that the law "clearly indicates that a departure requires the Board to identify *any* scale from which it departs and provide an individualized reason" for the departure) (emphasis in original); *Robinson v. Stanford*, No. 2392/2018 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (Board denied parole despite petitioner receiving "the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement," and finding the Board's citation to the welfare of society, "directly contradicts these scores in [petitioner's] COMPAS assessment."); *Hill v. N.Y. State Bd. of Parole*, No. 100121/2020, at 11 (Sup. Ct., NY Cty. Oct. 23, 2020) (holding that the Board's denial of parole for public safety reasons was inconsistent with low COMPAS scores and therefore required an explanation pursuant to 9 NYCRR §8002.2).

Conclusion

For these reasons and those stated in the Petition, Mr. [REDACTED] respectfully requests that this Court grant the Petition and order Respondents to hold a *de novo* parole review pursuant to the specifications in the Petition, and to give any other relief this Court may deem appropriate.

Dated: New York, New York
January 15, 2021



Martha Rayner, Esq.

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Pro Bono

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