Administrative Appeal Brief - FUSL000026 (2015-05-01)

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ADMINISTRATIVE APPEAL OF
NEW YORK STATE PAROLE DECISION FOR

NYSID: 

DIN: 

AC: 

Taconic Correctional Facility
250 Harris Road
Bedford Hills, NY 10507

Parole Hearing Date and Denial Date: March 3, 2015
Inmate Parole Hearing Location: Taconic Correctional Facility
Parole Panel Location: New York, New York
Notice of Appeal Filed: March 11, 2015

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Submitted on May 1, 2015 via overnight mail

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1. The Parole Board’s Decision was Arbitrary and Capricious Because the Board Stated it Would Not Consider Any New Information Between the January 2014 Hearing and the Instant De Novo Hearing, and Therefore it Did not Weigh the Required Statutory Factors

The Parole Board unlawfully and irrationally approached March 3, 2015 de novo hearing as a “do over,” such that it ignored fourteen months of positive developments in Ms. life bearing on her suitability for release. Ex. 1 at 2. Executive Law § 259-i(2)(c)(A) requires that the Board consider certain factors in each parole decision, including the applicant’s institutional record, the applicant’s goals and accomplishments and the applicant’s future plans for release. Yet during Ms. March 3, 2015 de novo parole hearing, the Board stated that it would not consider anything which had developed since Ms. January 7, 2014 hearing, which was the flawed hearing which gave rise to the March 3, 2015 de novo hearing. See Ex. 1 at 5, 19. The Board declared it would treat the fourteen months between the two hearings “like it didn’t happen.” Id. at 5. Given this approach, the Board could not possibly have considered the statutory factors required by law, because such factors could not be considered under the fiction that fourteen months of Ms. life had not passed at all. Ms. updated COMPAS Report, her updated Parole Board Report,

See EXEC. LAW § 259 i(2)(c)(A) requiring that the Board consider “(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty seven of the correction law; (v) any statement made to the board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated; and (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law.”
her updated individualized psychological evaluation, her continued good behavior, and updated letters of support from her family members bearing on her plans for release – all of which changed in the past fourteen months – were not considered. See Ex. 2. Moreover, the fourteen months of retributive punishment was not considered.

During Ms. [redacted] hearing, the Board repeatedly noted that because the hearing was *de novo*, the Board would approach the time elapsing since Ms. [redacted] January, 2014 hearing as if it never existed. Ex. 1 at 5. The Board treated this time period “like it didn’t happen.” Id. The Board went so far as to state that it was “pretending that things didn’t take place between January and [the *de novo* hearing].” Id. The Board even explained that it would not consider a hypothetical disciplinary ticket created in the past fourteen months, because “[w]e’re not considering anything between January 14th [sic] and now.” Id. at 19. In referring to the hypothetical ticket issued since the January hearing, the Board claimed it “couldn’t consider it.” The Board erroneously believed it was tasked to conduct a “do-over” of the prior, flawed hearing by considering only information that was considered in the prior hearing absent the flaws. Id. at 2-3 (“...we don’t want the same mistake twice...”).

Although the Board stated in a conclusory manner that it would consider Ms. [redacted] new letters of support, and her new psychological evaluation (Id. at 7-10), it later made clear that, “we’re not considering anything between January 14th and now.” Id. at 19. The Board could not both ignore the past fourteen months and consider new supporting documentation created in the past fourteen months. The Board’s position is bizarre and demonstrates it did not consider the required factors. Over one year of Ms. [redacted] life passed since her January, 2014 hearing. During this time, Ms. [redacted] life and future plans changed in ways relevant to many of the statutory factors the Board is required to consider. See EXEC. LAW § 259-i(2)(c)(A).
The Board’s misguided approach is vividly demonstrated by its refusal to consider an up-to-date COMPAS created on March 2, 2015 (see Ex. 3) and instead rely on the outdated COMPAS prepared for the January, 2014 hearing. See Ex. 4. Despite Ms. [redacted] informing the Parole Board of the new COMPAS, the Board declined to use it “because in a de novo interview, we’re pretending that things didn’t take place between January and now.” Ex. 1 at 5.

The Board, however, is required to weigh Ms. [redacted] most recent COMPAS report. See EXEC. LAW § 259-c(4); COMP. CODES R. & REGS. tit. 9, § 8002.3 (the Parole Board shall consider “the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision”). There is no exception for de novo hearings.

This error was significant because the new COMPAS casts Ms. [redacted] in a more favorable light than the outdated COMPAS report. Ms. [redacted] most recent COMPAS concluded she was at the lowest risk of absconding (level one), compared to the outdated COMPAS that placed Ms. [redacted] at level two. See Ex. 3; Ex. 4. The up-to-date COMPAS placed her at a level two on unlikely to have financial re-entry issues and a level three for unlikely to face employment issues, as opposed to a higher level of four on both in the outdated COMPAS. See Ex. 3; Ex. 4. The Board did not consider these positive changes in Ms. [redacted] COMPAS assessment; instead, it relied on an outdated and inaccurate assessment despite knowing an accurate and up-to-date assessment was available this is the definition of irrational and contravened the Board’s own regulations. See COMP. CODES R. & REGS. tit. 9, § 8002.3.2

As with Ms. [redacted] new COMPAS, given the Board’s approach to the de novo hearing, the Board could not have weighed Ms. [redacted] new Parole Board Report. See Ex. 5

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2 Ms. [redacted] is unable to evaluate whether there are other distinctions between the current and the outdated COMPAS because she was provided only a portion of the current COMPAS and it contained redactions, unlike the outdated COMPAS, the entirety of which she was provided.
In fact, the Commissioner only refers to an old 2014 Parole Board Report during Ms.’ hearing. Ex. 1 at 4. Yet the law requires that the Board weigh Ms. most current needs assessment tools, which includes her Parole Board Report. See EXEC. LAW § 259-c(4); COMP. CODES R. & REGS. tit. 9, § 8002.3. Ms. most recent Parole Board Report shows that she presents at the lowest level mental health risk. Ex. 5 at 2. It also shows that Ms. has continued her good behavior, with only three disciplinary infractions, and that her most recent infraction occurred nine years ago in 2006. Id.

Further, the Board was required to consider Ms. institutional record. See EXEC. LAW § 259-i(2)(c)(A)(i). Again, the Board could not have considered the entirety of Ms. institutional record, since it declared it was ignoring fourteen months of her incarceration. Since the Board stated it would not consider any new disciplinary problems, it follows that the Board failed to consider fourteen additional months of a continued stellar disciplinary record. See Ex. 1 at 19.

There is every indication that the Board’s irrational approach to the de novo hearing led it to ignore Ms. updated individualized psychological evaluation, prepared on January 20, 2015 in preparation for the March 3, 2015 hearing. See Ex. 2 at 6. The Board is required to weigh whether Ms. release will be “incompatible with the welfare of society.” EXEC. LAW § 259-i(2)(c)(A). Indeed, in denying parole, the Board concluded that Ms. release would be incompatible. See Ex. 1 at 21. This conclusion, however, is inconsistent with the conclusions of the current, individualized psychological evaluation, which indicates that the Board failed to consider this current and relevant information. See Ex. 2. at 17 (“Ms. appears to have a very low likelihood of reoffending or engaging in violent behavior if she is released from prison.”). The Board notes the existence of a psychological report in Ms.
The Board’s failure to consider this psychological report is unsurprising, given that it was prepared after the January, 2014 hearing and would not fall within the Board’s erroneous treatment of this hearing as a “do-over.” Id. at 2.

Finally, the Board was required to weigh Ms. plans for release. See EXEC. LAW § 259-i(2)(c)(A)(iii). Although the Board asked Ms. briefly about her plans, the Board could not fully have considered them. See Ex. 1 at 9-10. Since her January, 2014 hearing, Ms. family support has grown and developed. Importantly, Ms. eldest daughter provided a letter of support for the March, 2015 hearing, which did not exist in January, 2014. See Ex. 2 at 24. In this letter, speaks about her evolving relationship with her mother — her former co-defendant — and the emotional and practical support she can offer upon her mother’s release. Id. Ms. and his wife also provided the Board with a new letter of support, created in the time between the January, 2014 hearing and the de novo hearing. See id. at 25. This letter speaks to the “financial” and “moral” support and his wife will offer Ms. upon her release. Id. However, the Board did not consider either letter, both of which strongly bear on Ms. and his imprisonment bearing on those factors. The Board’s static approach in this
de novo hearing—its failure to consider fourteen months of important changes—was arbitrary and capricious and contrary to law.

2. The Parole Board’s Reliance on an Out-of-Date COMPAS when an Up-to-Date COMPAS was available Resulted in Reliance on Inaccurate Information.

The Parole Board relied on an out-of-date and thus inaccurate COMPAS used in two prior hearings (January, 2014 and October, 2014), when an up-to-date COMPAS assessment was readily available, rendering the Board’s decision arbitrary and capricious. Cf Ex. 4 (January 2, 2014 COMPAS), and Ex. 3 (March 2, 2015 COMPAS). Where “erroneous information [is] shown in the record of the proceeding,” and the Parole Board relies on this information (COMP. CODES R. & REGS tit. 9 § 8006.3) the Board’s decision should be reversed and vacated, and a new hearing granted using accurate information. See Comfort v. N.Y. State Bd. of Parole, 101 A.D.3d 1450, 1450 (3d Dep’t 2012) (ordering a new hearing where the Board considered a letter of opposition to release from a state trooper that contained erroneous information regarding petitioner’s past conviction).

Ms. [redacted] March 3, 2015 COMPAS Risk Assessment corrects numerous errors contained in her previous January, 2014 COMPAS. Ms. [redacted] most recent COMPAS concluded she was at the lowest risk of absconding (level one), compared to the outdated COMPAS that placed Ms. [redacted] at level two. See Ex. 3; Ex. 4. The up-to-date COMPAS placed her at a level two on unlikely to have financial re-entry issues and level three for unlikely to face employment issues, as opposed to the a higher level of four on both in the outdated COMPAS. See Ex. 3; Ex. 4. The Board did not consider these positive changes in Ms. [redacted] COMPAS assessment; instead it relied on an outdated and inaccurate assessment despite knowing an accurate and up-to-date assessment was available. This is the definition of irrational and contravened the Board’s own regulations. See Ex. 1 at 5 6 (In response to Ms. [redacted]
informing the Board that there was an updated COMPAS, it stated “[w]ell, this is the one [referring to the January, 2014 COMPAS] we’re going to use because in a de novo interview, we’re pretending that things didn’t take place between January and now. We’re going back to that date, almost like it didn’t happen, like we’re back in January 2014.”). The Board’s insistence that it would only consider an inaccurate, outdated assessment rather than an accurate and contemporaneous assessment demonstrates reliance on inaccurate information which requires reversal.

3. The Parole Board’s Decision was Irrational Because the Board Implied Ms. did not do Enough in Prison to Diminish the Loss of Life

In denying parole for the sixth time, the Board created an irrational standard, untethered to the law, which required Ms. to change the serious nature of her crime. The decision stated: “Your positive programming and clean disciplinary record since 2006 are both noted. However, neither of which diminish the serious loss of life caused by your actions.” Ex. 1 at 21.

First, the statutory factors that may be considered by the Board do not include determining whether the applicant has done enough to change the nature of the crime. See EXEC LAW § 259-i(2)(c)(A). Second, the seriousness of the crime cannot be changed—it cannot be diminished, reduced or deemed to be anything less than a tragic loss of life. To expect such is irrational. Where a Board acts with “irrationality bordering on impropriety,” the Board’s decision may be overturned. See Stanley v. N.Y. State Bd. of Parole, 92 A.D.3d 948, 949 (2d Dep’t 2012) (internal quotation marks omitted); Duffy v. N.Y. State Div. of Parole, 74 A.D.3d 965, 966 (2d Dep’t 2010). Thus the decision should be reversed.
4. The Board’s Inconsistent Grounds for Denial of Parole Over the Course of Six Parole Hearings Displays the Arbitrariness and Capriciousness of the Instant Decision.

The Board’s scattershot claims for denial of release are inconsistent and display the arbitrary nature of this parole denial. Ms. [REDACTED] first appeared before the Board on April 29, 2010, at which time the Board denied release based on all three statutory factors: “incompatible with the public safety and welfare of the community,” “reasonable risk of reoffending,” and “release would so deprecate the seriousness of the instant offense as to undermine respect for the law.” Ex. 6 at 10. At the second denial, the Board abandoned its claims of risk of reoffending and incompatibility and based denial solely on the claim that “release would so deprecate the serious nature of the crime as to undermine respect for the law.” Ex. 7 at 9-10. The third denial, on December 4, 2012, once again based denial on the deprecate claim and added the incompatible claim. But, denial was not based on a risk of reoffending. Ex. 8 at 12. The fourth denial, a de novo hearing held on January 7, 2014, was once again based on all three factors just like the first denial, four years before. Ex. 9 at 21. But less than ten months later, on October 28, 2014, denying parole for the fifth time, the Board abandoned its one consistent and long-held basis for denial—that release would deprecate the seriousness of the offense—and limited its basis for denial to risk of reoffending and incompatibility with public welfare. Ex. 10 at 16.

In the March 3, 2015 denial at issue here, the Board returned to the off-cited statutory reason that release “would so deprecate the serious nature of the crime as to undermine the respect for the law.” Ex. 1 at 21. But, although the Board did include the incompatibility claim,

3“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if 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.” EXEC. LAW § 259-i(2)(c)(A).
it once again abandoned the claim that there was a reasonable risk of reoffending even though just eight months before it claimed such a risk. Id. 4

Each subsequent parole denial is inconsistent with the previous. And, although the Board has been most consistent with denying parole based on a claim that release would deprecate the seriousness of the offense and be incompatible with the welfare of society, on one occasion the deprecate reason was not cited and on another occasion, the incompatibility reason was not cited. The Board, without explanation, shifts between basing its denials in the fact of Ms. [REDACTED] past crime, to the prospect of Ms. [REDACTED] as a future threat to society. This inconsistency demonstrates a scattershot approach that is inherently arbitrary and capricious.

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<thead>
<tr>
<th>Parole Hearing date</th>
<th>Reason for Denial</th>
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<tr>
<td>April 29, 2010 (Ex. 6 at 10-11)</td>
<td>“There is a reasonable probability that you would not live and remain at liberty without violating the law”</td>
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<td>“Your release would be incompatible with the public safety and welfare of the community”</td>
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<td>“Release at this time would so deprecate the seriousness of the instant offense as to undermine respect for the law”</td>
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<td>October 28, 2010 (Ex. 7 at 9-10)</td>
<td>“Release at this time would so deprecate the seriousness of the instant offense as to undermine respect for the law”</td>
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<tr>
<td>December 4, 2012 (Ex. 8 at 12)</td>
<td>“Your release would be incompatible with the public safety and welfare of the community”</td>
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<td>“Release at this time would so deprecate the seriousness of the instant offense as to undermine respect for the law”</td>
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<td>January 7, 2014 (Ex. 9 at 21)</td>
<td>“There is a reasonable probability that you would not live and remain at liberty without violating the law”</td>
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<td>March 2, 2015 (Ex. 1 at 21)</td>
<td>“Your release would be incompatible with the public safety and welfare of the community”</td>
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5. The Board’s Decision Was Impermissibly Conclusory and Lacking in Detail

The lack of explanation for the Board’s inconsistent conclusions further demonstrates random and erratic decision-making by the Board. The Board failed to explain why Ms. [redacted]’ release would be incompatible with the welfare and safety of society and why release at this time would deprecate the serious nature of the crime, and is therefore impermissibly conclusory and should be reversed. Under Executive Law § 259-i, reasons for denial “shall be given in detail and not in conclusory terms.” EXEC LAW § 259-i(2)(a); see Malone v. Evans, 83 A.D.3d 719, 719 (2d Dep’t 2011); Mitchell v. N.Y. State Div. of Parole, 58 A.D.3d 742, 743 (2d Dep’t 2009); West v. New York State Bd. of Parole, 41 Misc. 3d 1214(A) (Sup. Ct. Albany Co. 2013) (holding that the Parole Board must provide a “detailed written explanation [which] is necessary to enable intelligent judicial review of the Board’s decision.”); Matter of Chan v. Travis, N.Y.L. J., 2/27/03, p. 28, col. 4 (Sup. Ct. Albany Co. 2003)(“Noting an inmate’s positive institutional adjustment or achievements in the written decision is not tantamount to considering them in a fair, reasoned and individualized manner. Indeed, such cursory treatment turns on its head the reformatory or rehabilitative principle underlying an indeterminate sentence.”)(internal quotation marks omitted); Matter of Serrano v. Travis, No. 541-03, Slip Op. dated 9/22/03 (Sup. Ct. Albany Co. 2003) (“Merely parroting the statutory language is not compliance with the mandated statutory factors as unreasoned and pro forma denials [of parole] undennine the rehabilitative ideal which is the cornerstone of indeterminate sentencing under which thousands of inmates remain incarcerated in this State. Without more, the Board’s ‘seriousness of offense’ rationalization cannot stand.”).

The Court of Appeals did not designate a Parole Board’s decision “conclusory” when the decision was merely “less detailed than it might be.” Matter of Siao–Pao v. Dennison, 11 N.Y.3d 2003.
777, 778 (2008). Here, however, the Board’s decision does not just lack detail – the Board parrots the statutory language without explaining how or why Ms. lease merits categorization as “incompatible with the welfare of society,” or why denial would “deprecate the seriousness of the offense.” Ex. 1 at 21.

The requirement that the Board explain its reason for denial in detail is all the more necessary in light of the ever shifting reasons for denial from hearing to hearing. See Section 4 supra. Each subsequent parole denial is inconsistent with the previous. Id. The parole denial just eight months before the denial on appeal here did not claim that release would deprecate the seriousness of the crime, but the instant denial claimed it would. Yet such claim was not explained other than citing to the seriousness of the offense. See Ex. 1 at 21. But an explanation of the seriousness of the offense does not explain why release after almost 25 years of retributive punishment would in any way undermine the gravity of the offense to such a degree as to signal disrespect for the law, especially when just eight months earlier the Board did not cite this statutory reason as a concern. The lack of explanation for the Board’s inconsistent conclusions demonstrates random and erratic decision-making.

In the most recent hearing, at issue here, Ms. was denied parole on the grounds that “release would be incompatible with the welfare and safety of society and would so deprecate the seriousness of the instant offense as to undermine respect for the law.” Ex. 1 at 21. As to the first reason, the Board only notes Ms. positive record and accomplishments, but does nothing more than that. No analysis or discussion is done taking Ms. rehabilitation into account. Further the COMPAS risk assessment of Ms. used by the Parole Board places her at the lowest levels for risk of felony violence, arrest risk, criminal involvement, history of violence, and prison misconduct. See Ex. 4. Further, Ms. 
psychological report notes that she “appears to have a very low likelihood of reoffending or engaging in violent behavior if she is released from prison.” Ex. 2. at 17. Yet the Board finds Ms. [Redacted] release to be incompatible with the welfare and safety of society. This decision clearly contradicts the record and the findings of the COMPAS and requires more from the Board than a conclusory statement. Further explanation must be given as to why release is incompatible.

The need for detail is not only required but is also necessary for judicial review. Courts require the board’s decision to be sufficiently detailed to allow the possibility of intelligent review of parole boards’ grounds for denial. See Mayfield v. Evans, 93 A.D.3d 98, 110 (1st Dep’t 2012); Rabenbauer v. New York State Dep’t of Corr. & Cmty. Supervision, 983 N.Y.S.2d 206 (Sup. Ct. Sullivan Co. 2013) (Finding “no ability to evaluate” why a Board cited the seriousness of the offense and deprecation of the welfare of society, where the Board explained its reasoning in a “perfunctory manner”). Here, the Board’s decision does not permit an intelligent review of the grounds for denial. The lack of a detailed explanation for denial requires reversal.

6. The Parole Board Predetermined Ms. [Redacted] Parole Denial and Never Considered Release Because it Treated Her De Novo Hearing as an Administrative Technicality Which is Contrary to Law

The circumstances surrounding Ms. [Redacted] March 3, 2015 parole denial strongly indicate that the denial was predetermined long before Ms. [Redacted] sat before the Board. The Board treated the de novo hearing as a repeat of the January hearing as to both the information to be considered and the decision to be made. Yet, the March 3, 2015 hearing was not a mere “do-over” on a technicality. The law requires that the Board consider release every time an inmate is up for parole. EXEC LAW § 259-i(2)(c)(A). A predetermined decision is automatic grounds for a
de novo hearing: “The guarantee against arbitrary and irrational government action includes a right to a hearing before a fact-finder that has not predetermined the outcome of the hearing.” Duffy v. Evans, 2012 U.S. Dist. LEXIS 134174, *29 (S.D.N.Y. Sept. 19, 2012) (finding sufficient allegations of constitutional violation where a Parole Board repeatedly denied plaintiff parole). The inevitability of another denial was even signaled in Judge Schlesinger’s decision ordering a de novo hearing. See Ex. 11 at 12. Further, the hearing minutes indicate that the Board saw the de novo hearing not as a real opportunity to consider parole, but an administrative formality. The Board’s failure to use [Ms. ____] most recent Parole Board Report or her new COMPAS also indicates the Board’s bias against her. Finally, the Board’s decision itself indicates its predetermination, where the Board directs Ms. [_____] to do the impossible to gain parole, by somehow “diminish[ing]” the “loss of life” she caused. Ex. 1 at 21.

Judge Schlesinger’s January 13, 2015 decision, granting Ms. [_____] petition for a de novo hearing, acknowledged that another denial was inevitable. Ex. 11 at 12. Discussing the Board’s discretion to deny parole solely on the seriousness of the underlying offense, the opinion anticipates that the State, opposing Ms. [_____] Article 78 petition, could “urge that a new hearing, simply providing greater access to file documents, in all probably would not alter the result.” Id. The opinion goes on to conclude that “[t]he state may be right on this point.” Id. Judge Schlesinger’s observations draw into question the sincerity of the Board’s consideration of release at the de novo hearing. If a de novo hearing simply means correcting mistakes that occurred at the prior hearing, but does not include the consideration of release, then the remedy of a de novo hearing is no remedy at all. The requirement that parole be considered every two years would similarly be thwarted if the Board did not consider anew the applicant’s entire application – including the nature of the offense. After all, Ms. [_____] was not sentenced to
life in prison. She was sentenced to 20 years to life, with the possibility of parole. Having served 24 years, she is entitled to a fair hearing without a predetermined outcome each and every time she appears before the Parole Board. See Puffy, 2012 U.S. Dist. LEXIS 134174 at *29.

Echoing Judge Schlesinger’s opinion, the transcript of Ms. March 3 de novo hearing shows that the Board approached it as a mere “do over” correcting a technicality, rather than sincerely considering parole as required by law. Ex. 1 at 2. The Board focused heavily on the reasons why Ms. was granted a de novo hearing (see Ex. 1 at 1-4), even explicitly stating, “we don’t want to make the same mistake twice...” Id. at 2. The Board even called the hearing a “do-over.” Id. at 2. The Board acknowledged the hearing was a charade by repeatedly noting that because the hearing was de novo, the Board would act as if the time elapsing since Ms. January hearing never existed. Id. at 5, 19; see Section 1, supra. The Board went so far as to engage in the pretense that the time between the prior hearing and the de novo hearing “didn’t happen.” Id. Yet, over a year of Ms. life had gone by since her January, 2014 hearing. During this time, Ms. life and future plans had changed in ways that impacted many of the statutory factors the Board is required to consider. The Board clearly did not consider parole, because consideration was precluded by the fiction that fourteen months of Ms. life had not passed at all. Since the Board denied parole then, and the passage of time since then “didn’t happen,” then there would be no reason parole would not be denied again. The Board’s misguided approach to the nature of this de novo hearing shows clearly that the denial was determined before Ms. ever sat down before them.

In keeping with its “do-over” approach to the de novo hearing, the Board also failed to consider Ms. most recent COMPAS report and Parole Board Report, neither of which were available during Ms. January 7, 2014 hearing. See Ex. 1 at 5. The Board’s
decision to ignore these documents, which shed positive light on Ms. continued good behavior (see Section 1, supra). evidence the predetermination of the denial. Had the Board been open to considering parole, Ms. continued good behavior in prison for the past fourteen months would plainly be highly relevant.

The Board’s confusing and illogical reasoning for its denial also evidence predetermination. In its decision, the Board notes Ms. positive programming and disciplinary record, but states that neither “diminish the serious loss of life caused by your actions.” Ex. 1 at 21. The idea that an offender can ever do enough in prison to “diminish” loss of life is arbitrary and irrational in its own right. See Section 3 supra. But its inclusion as a rationale for Ms. denial also strongly points to predetermination. The Board sets before Ms. an impossible task – diminishing the seriousness of death through programming or other rehabilitative efforts. Yet the seriousness of death will never change, no matter what Ms. achieves in prison. This statement shows that the Board was not considering parole, nor was it permissibly considering the seriousness of the offense as a stand-alone factor in its decision. It was erecting an impossible hurdle for Ms. in an attempt to justify a decision made prior to examining Ms. application, if her application was even considered at all. Rather, as one court admonished in Winchell v. Evans, “one is left with the impression that the State’s position is that because of . . . past crimes, there would, in essence, never be a time that [she] would be suitable for release, no matter what [she] has accomplished in twenty-seven years of imprisonment.” 910 N.Y.S.2d 766 (Sup. Ct. Sullivan Co. 2010). As another court noted, a predetermined approach to parole hearings, wherein a board shows no “genuine interest” in ever seeing an inmate released will “rob inmates of hope, promote despair, discourage personal growth, and strip them of any incentive to discover insight or to seek
redemption, in addition to perpetually burdening the courts and correctional institutions with inmates who have been truly rehabilitated and who could be productive citizens.” Robles v. Dennison, 745 F. Supp. 2d 244, 287 (W.D.N.Y. 2010) aff’d U 449 F. App’x 51 (2d Cir. 2011). The Board’s imposition of an impossible standard for parole that has no basis in the law demonstrates that it had no intention of considering release.

As evidenced by Judge Schlesinger’s observations, the Board’s treatment of the hearing as a technical “do-over,” its failure to even look at Ms. new Parole Board and COMPAS Reports, and its irrational explanation of its reason for denial, the Board predetermined its March 3, 2015 denial.

7. The Board Failed to Acknowledge Ms. Positive Accomplishments, Showing a Lack of Meaningful Consideration

The Parole Board hastily mentioned the categories of Ms. record that were considered but failed to mention any individualized particulars of such categories; such cursory references do not constitute actual consideration of the relevant statutory factors. “[P]assing mention in the Parole Board’s decision of petitioner’s rehabilitative achievements ‘cannot serve to demonstrate that the Parole Board weighed or fairly considered the statutory factors where . . . it appears that such achievements were mentioned only to dismiss them in light of the seriousness of the petitioner’s crime.’” Rios v. N.Y. State Div. of Parole, 15 Misc.3d 1107(A) (Sup. Ct. Kings Co. 2007) (internal quotation marks omitted) (citing Kinu v. N.Y. State Dep’t of Corn and Cmty. Supervision, 42 Misc.3d 1232(A) (Sup. Ct. New York Co. 2014) (ordering a de novo hearing because “[t]he parole board gave great weight to the seriousness of [the] crime without any explanation of why the seventeen-year-old crime outweighed the voluminous evidence that indicates that [the inmate] would be able to live a quiet and crime-free life in society.”).
Just as in Rios, the Board in Ms. [redacted] recent hearing generally mentioned multiple statutory factors, only to then assert, without explanation, that "release at this time is not warranted." Ex. 1 at 22. The Board stated: "Required statutory factors have been considered together with your institutional adjustment including discipline and program participation, your Risk and Needs Assessment, and your needs for successful reentry into the community. Your release plans and any letters of reasonable assurances are also noted." Id. at 21. This conclusory statement fails to demonstrate that the Board fairly considered the required statutory factors. See Morris v. New York State Den't of Corr. & Cmty. Supervision, 40 Misc. 3d 226, 233-34 (Sup. Ct. Columbia Co. 2013) "conclusory statement that 'required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration,' were woefully inadequate in the circumstances of this case to demonstrate that the Board weighed or fairly considered the required statutory factors."

That the Board, in its decision, did not mention a single detail of Ms. [redacted] clinical psychological evaluation, letters of support, family support, or release plans demonstrates that the Board never actually considered or weighed these factors. During the hearing, the Parole Board only mentioned Ms. [redacted] letters of support, psychological evaluation, institutional programming record, COMPAS report and her disciplinary record to obtain her confirmation that she was satisfied with the documents. See Ex. 1 at 5, 7, 9, 10. The Board did not mention any details about these factors or seek to discuss them with Ms. [redacted].

The Board did not mention the letter submitted by Ms. [redacted] daughter, [redacted] was her mother’s co-defendant and served six and a half years in prison because of her mother’s crime. As the Board has acknowledged in past hearings, [redacted] was another victim of her mother’s crime (sec e.g., Ex. 10 at 14), yet the Board indicated no
consideration of [Redacted] letter. The Board’s failure to consider [Redacted] letter violated Executive Law §259-i(2)(c)(A)(v) which requires “any statement made to the board by the crime victim” be considered. Despite being greatly impacted by Ms. [Redacted] crime, [Redacted] believes that Ms. [Redacted] has accepted responsibility for what happened, that Ms. [Redacted] has “come to control her anger” and “change[d] into a different person,” and that [Redacted] “truly believe[s] she deserves a second chance.” Ex. 2 at 24. Ms. [Redacted] has acknowledged that her daughter [Redacted] was also a victim of her crime (see Ex. 1 at 13), yet [Redacted] statement was not even acknowledged by the Board. Notably, the former Superintendent of Bedford Hills Correctional Facility [Redacted] stated that [Redacted] is probably the person best situated to vouch for the changes that Ms. [Redacted] has created in herself” and that “nothing is to be gained by further incarceration.” Ex. 2 at 22.

8. The Inclusion of an Inaccurate and Inflammatory New York Times Article in Ms. [Redacted] File was Inappropriate

Ms. [Redacted] confidential parole file contains an inflammatory 1991 New York Times article that inaccurately frames Ms. [Redacted] crime and her intentions preceding her crime. This article should not have been included in Ms. [Redacted] file nor considered by the Board. Yet, prior to Ms. [Redacted] March 3, 2015 hearing, DOCCs declined to remove the article from Ms. [Redacted] file. See Ex. 12. False or prejudicial information must be removed from an inmate’s file. See Garrett v. Couhlin, 128 A.D.2d 210, 212 (3d Dep’t 1987)(“It is imperative . . . that [prison records] be free not only of false but mischievously equivocal information which might unfairly and prejudicially impact future deliberations bearing on the inmate’s status.”); See Hetherington v. Coughlin, 127 A.D.2d 594, 595 (2d Dep’t 1987)(ordering expungement of false information from a parole file); See Robles v. Dennison, 745 F. Supp. 2d 244, 277 (W.D.N.Y. 2010) affd, 449 F. App’x 51 (2d Cir. 2011)(noting that a parole board
should not have been allowed to consider a politician’s letter recommending parole be denied for an inmate who committed a highly publicized murder). Moreover, allowing the Parole Board to consider a misleading newspaper article contradicts extensive regulations surrounding Victim Impact Statements. See COMP. CODES R. & REGS. tit. 9, 8002.4. The Parole Regulations address at length the type of Victim Impact Statements allowable, the methods for receipt of Victim Impact Statements, and the policy behind allowing crime victims a voice in parole decisions. Id. Yet, the Regulations never discuss newspaper articles or other types of supplemental documentation describing a non-victim’s impressions of the crime. In fact, even a Victim Impact Statement “may not simply repeat the circumstances of the crime,” but should focus on the crime’s effect on the victim. Id. at 8002.4(d)(6). If the regulations disallow even the victim to present an account of the circumstances of the crime, surely they implicitly reject incendiary journalistic accounts of the same.

Here, the policy against third party renditions of the circumstances of a crime is particularly relevant. The 1991 article contains inaccurate information, and is a dramatized rendition of the facts of Ms. [redacted] case—facts which are already available in her parole file. Ex. 13. The remainder of the article is replete with the implication that Ms. [redacted] plotted to kill her victim with the intention of stealing her baby. Yet, Ms. [redacted] never pleaded guilty to a premeditated plot to kill her victim—rather she pleaded guilty to Murder in the Second Degree. See Ex. 14 at 8. Ms. [redacted] actual plea is markedly different from a potential pica to First Degree Murder, which encompasses cases in which a defendant kills in furtherance of a kidnapping. PENAL LAW § 125.27(vii). Ms. [redacted] admitted not to a plot to kill her victim and steal her baby, but to killing in the heat of an argument (see Ex. 14 at 5-7).
albeit with the requisite “intent” to cause her victim’s death. See PENAL LAW § 125.25. She never admitted guilt to a premeditated plot and was not given a sentence commensurate with a premeditated plot. The 1991 article is a provocative account that unfairly impacts Ms. ___ and it should not have been before the Board. Its inclusion requires reversal.

9. The Parole Board Failed to Disclose that Confidential Information Was Used as a Basis for Denial

A victim impact statement from a person unknown to Ms. ___ is in Ms. ___ parole file (see Ex. 11 at 3), yet the Board failed to mention in its decision that this statement was relied upon. See Ex. 1. Executive Law §259-i(2)(c)(A)(v) requires that “any statement made to the board by the crime victim” be considered. Additionally, Executive Law § 259-i(2)(a) mandates that “the inmate shall be informed in writing ... of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.” The Board’s failure to mention the victim impact statement and the role it played in its decision requires reversal.

The Board considered the victim statement that was in Ms. ___ parole file because the law requires it to do so. Failure to reveal this factor in the decision denying parole is grounds for ade novo hearing. See West v. N.Y. State Parole Bd., No. 3069-13., 2013 WL 5657701 (Sup. Ct. Albany Co., Sept. 24, 2013) (holding that the confidentiality of information cannot “trump the statutory requirement that the Board's decision reveal the factors and reasons it considered in reaching its decision”); Almonor v. New York State Bd. of Parole, 16 Misc. 3d 1126(A) (Sup. Ct. New York Co. 2007) (“[DOCCS] has not presented a single argument supporting its right to base its decision on the [confidential] papers without informing petitioner that the papers played a role in the parole determination.”).
Although the contents of the victim impact statement was not disclosed to Ms. [redacted] (Ex. 11 at 3), the Board’s consideration of it and the role it played in the determination to deny parole cannot be kept secret from Ms. [redacted] Sec West, 2013 WL 5457701 at *3 (“The degree to which the victim impact statement figured in the Board’s decision is particularly critical. The Board’s disingenuous and purely ceremonial description of the factors and reasons for its decision transforms the parole process into a charade in which meaningful judicial review repeatedly is subverted, where... material relied upon by the Board remains undisclosed in the hearing and in its determination.”). The Board’s failure to provide detailed reasons for its denial (see Section 5, supra), coupled with evidence in the record that is wholly inconsistent with the Board’s conclusory reasons for denial, (see Section 7, supra), strongly indicates that confidential information was relied upon. The Board’s failure to disclose such reliance requires reversal.

10. NYS DOCCS Failed To Use a TAP as Required by Correction Law § 71-a

The Board’s failure to develop and utilize a TAP for Ms. [redacted] violated New York Corrections Law. In 2011, Executive Law § 259-c(4) and Correction Law § 71-a were amended. The amendment to Correction Law § 71-a requires the following procedures be executed: “Upon admission of an inmate committed to the custody of the department under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan.” N.Y. CORRECT. Law § 71-a. This plan is for the purpose of “promot[ing] the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision.” Id. Correction Law § 71-a also states that a TAP “shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment
needs of the inmate.” Id. There is no question a TAP was not developed or utilized in connection with Ms. March 2015 parole hearing.

Any suggestion that this requirement to develop a TAP only applies to inmates admitted since 2011 flies in the face of the legislative intent. The legislature explicitly emphasized the individual and societal benefits of using a TAP, describing those benefits as the very purpose of the legislation. See N.Y. CORRECT. LAW § 71-a. It does not rationally follow that the legislature would seek to limit such benefits to newly admitted persons and leave the vast number of current prisoners without such benefit.

Despite Ms. hearing occurring on March 3, 2015, long after Respondents’ purported TAP launch date, the statutory requirements were ignored and a TAP was never developed or submitted for consideration in her parole proceedings. Had a TAP been utilized, it undoubtedly would have further demonstrated her exemplary rehabilitation. A TAP also would have demonstrated her high likelihood of success upon release to parole supervision, including her acceptance into Hour Children, a well-regarded transitional housing and social services agency, and her excellent work skills as vouched for by a prison job supervisor and demonstrated by her obtaining the position of grievance clerk, a job that requires great responsibility and discretion. Moreover, the Board’s denial was partially based on a claim that Ms. release would be “incompatible with the welfare and safety of the community” (Ex. 1 at 21), yet the very instrument designed to assess and promote safe community reentry—a TAP—was not developed nor made available to assist the Board in making this critical decision.

The use of a COMPAS assessment does not satisfy the Correction Law § 71-a TAP mandate because they are distinct instruments serving different functions. The memo issued on October 5, 2011 by then Chairperson of Parole, Andrea Evans indicates that COMPAS and TAP
are separate and distinct instruments by describing how the Parole Board received training in the COMPAS “to understand the interplay between that instrument and the TAP instrument.” Ex. 18 at 1. Moreover, though New York’s Parole Board has yet to fully implement a TAP, Michigan’s TAP provides some insight into the distinction between the two instruments. The COMPAS is a limited tool that assesses criminogenic factors that contribute to risk; while it contributes to the assessment of needs, it provides zero guidance on how to proceed after this assessment. In contrast, a TAP evaluates an inmate in four areas: needs, goals, tasks, and activities, then provides an overarching, comprehensive set of planning procedures designed to mitigate risks and thoroughly promote rehabilitation and successful reentry upon release from prison. Id.

Correction Law § 71-a demands the implementation of a comprehensive TAP instrument, which is not satisfied by use of a limited COMPAS assessment.

The law requires the use of a TAP, not a substitute. In flagrantly ignoring the statutory requirement, the Parole Board acted arbitrarily, capriciously, and contrary to law. Ms. should be afforded a de novo hearing utilizing the statutorily required TAP so her strong rehabilitation can be properly assessed and weighed into the parole decision.6

11. The Parole Board’s Failure to Provide Meaningful Review Has Rendered Appellant Arbitrarily and Indefinitely Detained and Therefore Arbitrarily Detained in Contravention of the International Covenant on Civil and Political Rights

The basis for the Parole Board’s denial of Ms. application for release on parole renders Ms. continued detention indefinite and therefore arbitrary, in contravention of international human rights law. The Board has on six occasions denied Ms. parole

6 Judge Schlesinger’s opinion, in a footnote, rejects the contention that the Board should have prepared a new TAP for Ms. January 7, 2014 hearing, concluding that the TAP merely describes the inmate when she begins serving her sentence. See ex. 11 at 4, n. 2. As discussed, the TAP evaluates inmates in four categories, and provides more insight into rehabilitation than the COMPAS.
application on various grounds including that her release would deprecate the seriousness of her crime, would be incompatible with the welfare and safety of the community, and that there was a reasonable probability of reoffending. This time, the Board denied parole based on the deprecate and incompatibility reasons. The conclusory manner in which the Board delivered its denial fails to give Ms. application meaningful consideration because it is insufficiently clear and explicit in conveying the appropriateness of Ms. continued detention and predictability of her release. This insufficiency amounts to indefinite detention, a form of arbitrary detention, and as such causes the United States to be in violation of human dignity under Article 9 of the International Covenant on Civil and Political Rights (an international human rights treaty to which the United States is a party).

The protection against arbitrary detention contained in the ICCPR requires an individualized determination that detention is necessary, reasonable, and proportional - all of which are to be determined both initially and over time. See Office of the U.N. High Commissioner for Refugees, UNHCR Guidelines on the Applicable Criteria and Standards related to the Detention of Asylum-Seekers and Alternatives to Detention, Guideline 6, 2012.

The need to detain an individual is to be assessed in light of the purpose of the detention. Id. The overall reasonableness of that detention must be determined in light of all the circumstances, including any special needs or considerations in the individual’s case. Id. The general principle of proportionality requires that a balance be struck between the individual’s rights to liberty and the public policy objectives of limiting or denying those rights. Id. The necessity and proportionality tests further require an assessment of whether there were less restrictive alternatives to detention that would have been effective. Id.
The Parole Board’s decision to deny Ms. release on parole completely fails to make an individualized determination under present circumstances as to whether Ms. continued detention was necessary, reasonable, or proportional. While Ms. minimum sentence of twenty years was presumably intended as both a retributive and reformative measure, the reasonableness of her detention after twenty-four years should cease to be based in any part on punitive grounds alone and meaningfully consider Ms. present-day circumstances and rehabilitative progress. As mentioned in this appeal, the Parole Board failed to discuss in detail Ms. many positive signs of progress throughout the course of her detention, much less explain why detention was still deemed necessary, reasonable, or proportional in light of that progress. Failure to delineate the reasonableness of Ms. continued detention also causes the Board’s decision to fail under the proportionality test as Ms. rehabilitative progress significantly diminishes any public policy need to restrict her rights to liberty. The Board’s apparent pattern of automatically denying parole on the unelaborated grounds of likelihood of reoffending and incompatibility with the welfare and safety of the community falls short of individualized assessment of the need, reasonableness, or proportionality of detention, and thus fails to satisfy the requirement protecting against arbitrariness under the ICCPR. See International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions, Open Society Justice Initiative, April 2013, at 10.

Conclusion

For these reasons, Ms. respectfully requests that the administrative appeal unit order a de novo hearing.
DATED: May 1, 2015

Sincerely,

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