Art. 78 Response - FUSL000123 (2019-03-13)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

Petitioner,

-against-

TINA M. STANFORD, CHAIR OF THE NEW YORK STATE PAROLE BOARD,

Respondent.

ANSWER AND RETURN

Index No. [redacted]
Hon. Peter M. Forman

Respondent, by and through her attorney, Letitia James, Attorney General of the State of New York, Elizabeth Gavin, of counsel, submits the following as an answer and return upon the petition:

1. Denies each and every allegation of the petition except to the extent they are confirmed by the attached records and leaves the determination of legal issues and conclusions contained therein to the Court.

2. The grounds for respondent's actions are fully set forth in the determinations being challenged and the Return annexed hereto.

3. The determinations and record demonstrate that respondent acted in compliance with the law and that the determination was neither arbitrary, nor capricious.

PRELIMINARY STATEMENT

4. Petitioner, an inmate at Otisville Correctional Facility in Orange County, is serving an indeterminate sentence of 32 ½ years to life upon his convictions for Murder in the second degree and Assault first degree. Exhibit 1. Petitioner's sentence was as second felony offender. Id.

5. Petitioner's instant offense is related to the murder of his wife, [redacted], and the stabbing of a third party who came to his wife's aid. Exhibit 2. On December 2, 1981, petitioner went to his estranged wife's place of employment in Brooklyn, NY, where he pretended to be a deliveryman so that she would come out to speak to him. Exhibit 1, Page 3. When she came into the lobby, petitioner pushed his wife into a small hallway. Id. Witness, [redacted], followed and thought he saw the petitioner punching his wife. Id. [redacted] kicked petitioner, and then saw that he was armed with a knife. Id. Petitioner tried to stab [redacted], but cut [redacted]'s left hand. Id. [redacted] kicked petitioner, and he ran away. Id. [redacted] died of her injuries. Id. [redacted]'s injury required surgery, and he suffered a permanent injury to his hand. Exhibit 2 at Page 5. Petitioner subsequently fled the State of New York, and he was later extradited from Arkansas. Id.

6. Petitioner was thirty years old at the time of his wife's murder. Id. Prior to that incident, he had fifteen prior arrests. Id. On April 12, 1981, petitioner was arrested for Assault with intent to cause physical injury, Reckless Endangerment 2, Acting in a manner to injurious of a child under 16. Exhibit 1, Page 2. That arrest was related to a physical altercation with a neighbor while in the presence of children. Exhibit 4, Pages 6-7. On November 28, 1979, petitioner was arrested for Assault 3 and Possession of a Weapon 4 for threatening his wife with a gun and beating her. Exhibit 2, Page 15.

7. Prior to that occurrence, petitioner was convicted of Attempted Criminal Possession of a Weapon 3 and received a sentence of to one year of incarceration for an incident involving him shooting a gun into an apartment building. Exhibit 2, Pages 6-9. The incident underlying that arrest occurred on May 28, 1979, when petitioner got into a fight with his wife at her stepmother's apartment because he "suspected her of going around with other men". Exhibit

2, Page 9. Petitioner threatened to come back with a gun and left the scene. Id. Petitioner returned an hour later and fired four shots into the window of an adjacent apartment. Id. No one was harmed. Id. After his conviction, but before his sentencing, petitioner fled the State of New York to Memphis, Tennessee. Exhibit 2, Page 15. Again, petitioner was extradited back to New York. Id.

8. Prior to that, petitioner had eight arrests in the State of Illinois ranging from Disorderly Conduct to Murder. Exhibit 2, Page 7. While several of the dispositions of these cases are unknown, Petitioner received at least two jail sentences and a period of probation. Id.

9. Aside from his recorded arrests, the mother of petitioner's deceased wife told police that petitioner was frequently violent towards her daughter, caused injuries that required hospitalization several times, and once dangled their four-year-old child out of a window until his wife told him that she hated her mother. Exhibit 2, Page 4. Petitioner's deceased wife told police after his arrest for shooting into her stepmother's apartment building that he beat her up several times and that she had an order of protection from Family Court against him. Id. at Page 12.

AS AND FOR A DEFENSE TO THE PETITION

10. In the instant litigation, the Petition raises the following issues presented at the administrative level:

(1) the Board's denial was arbitrary and capricious because the Board placed excessive weight upon Petitioner's criminal behavior without properly considering other factors such as his rehabilitation efforts and his COMPAS instrument;
(2) the decision violates due process; and
(3) the decision fails to provide adequate details.
(4) he has not been able to obtain his sentencing minutes

Petitioner seeks release or, in the alternative, a *de novo* interview whereupon his release shall be ordered.

11. The Petition raises for the first time the issues of whether the record reflected petitioner's lack of remorse and whether the petitioner was at risk for re-offense. These issues were not raised in the administrative appeal filed by petitioner, and thus, they are waived. Cruz v Travis, 273 A.D.2d 648, 711 N.Y.S.2d 360 (3rd Dept 2000); Moore v New York State Board of Parole, 233 A.D.2d 653, 649 N.Y.S.2d 830 (3rd Dept 1996); Matter of Samuels v Kelly, 143 A.D.2d 506, 533 N.Y.S.2d 46 (4th Dept 1989), leave to appeal denied 73 N.Y.2d 707, 539 N.Y.S.2d 300 (1989); Beyah v Leonardo, 182 A.D.2d 868, 581 N.Y.S.2d 897 (3rd Dept 1992); Hernandez v Alexander, 64 A.D.3d 819, 881 N.Y.S.2d 707 (3rd Dept. 2009); Santos v Evans, 81 A.D.3d 1059, 916 N.Y.S.2d 325 (3rd Dept. 2011); Tafari v Evans, 102 A.D.3d 1053, 958 N.Y.S.2d 802 (3rd Dept. 2013); Del Rosario v Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Peterson v Stanford, 151 A.D.3d 1960, 59 N.Y.S.3d 219 (4th Dept. 2017); Brunson v New York State Deaprtment of Corrections and Community Supervision, 153 A.D.3d 1077, 60 N.Y.S.3d 577 (3d Dept. 2017).

Standard for discretionary release on parole

12. As an initial matter, discretionary release to parole is not to 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 the law." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). A conclusion that an inmate fails to satisfy any one of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477 (2000); Matter of Hamilton, 119 A.D.3d

at 1273-74; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21 (1st Dept. 2007).

13. In making this determination, Section 259-i(2)(c)(A) requires the Board to consider certain factors:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii) performance, if any, as a participant in a temporary release program;
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> (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 and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
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> (v) any current or prior 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;
>
> (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;
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> (vii) 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; and
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

14. In 2011, the law was amended to further require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042 (3d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559 (4th Dept. 2014). The COMPAS instrument cannot mandate a particular result. Matter of

King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021 (3d Dept. 2017).

15. While consideration of the statutory factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon, 95 N.Y.2d at 477. Thus, it is well settled that the weight to be accorded each factor is within the Board's discretion. See, e.g., Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016); Matter of Delacruz v. Annucci, 122 A.D.3d 1413 (4th Dept. 2014); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board need not explicitly refer to each and every one of them in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497 (3d Dept. 2017); Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141 (3d Dept. 2016). In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945 (3d Dept. 1990).

16. On review, the Court's "role is not to assess whether the Board gave the proper weight to the relevant factors," Matter of Hamilton, 119 A.D.3d at 1271 (quotation omitted), or to "substitute its judgment for that of the Board," Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 240 (1st Dept. 1997). Under Executive Law § 259-i(5), actions undertaken by the Board are deemed to be judicial functions and are not reviewable when made in accordance with law. Matter of Kelly v. Hagler, 94 A.D.3d 1301 (3d Dept. 2012); Matter of Cruz v. Travis, 273 A.D.2d 648 (3d Dept. 2000). When construing this language, the Court of Appeals held that "so

long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts." Matter of Briguglio v. N.Y. State Bd. of Parole, 24 N.Y.2d 21, 29 (1969) (quoting Matter of Hines v. State Bd. of Parole, 293 N.Y. 254, 257 (1944)). Thus, the petitioner has the heavy burden of showing the Board's determination is irrational "bordering on impropriety" before judicial intervention is warranted. Matter of Silmon, 95 N.Y.2d at 476; Matter of Mullins, 136 A.D.3d at 1141; Matter of Hamilton, 119 A.D.3d at 1269.

The record reflects the decision was properly made

17. The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses which included the Stabbing death of his estranged wife in the lobby at her place of unemployment, and stabbed a bystander when he tried to intervene, as well as his history; his institutional record including completion of ASAT and A Tier II disciplinary infraction; and his release plans. The Board also had before it and considered, among other things, letters of support, Petitioner's case plan, the COMPAS instrument, Petitioner's parole packet and personal statement. During the interview, Petitioner was given the opportunity to discuss relevant matters including his views on his criminal behavior. He expressed remorse in his closing statement, but the Board noted his perfunctory recitation of the facts surrounding his wife's death.

18. After considering all required factors, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the instant offenses involving Petitioner, where he went to his estranged wife's place of employment and stabbed her to death, and also stabbed a second victim who attempted to protect her, causing severe injury to the victim's hand, the escalation of his criminal history and offenses in both New York and Illinois. See, e.g., Matter of James v. New

York State Bd. of Parole, 136 A.D.3d 1089, 1090 (3d Dept. 2016); Matter of Thompson v. New York State Bd. of Parole, 120 A.D.3d 1518, 1518-19 (3d Dept. 2014); Matter of Rodriguez v. Evans, 102 A.D.3d 1049 (3d Dept. 2013); Matter of Walker v. New York State Bd. of Parole, 218 A.D.2d 891 (3d Dept. 1995). While the Board commended Petitioner's positive growth and productive use of time, his rehabilitative efforts did not prevent the Board from finding, as it did, that release at this time would be incompatible with the welfare of society and undermine respect for the law by deprecating the severity of his offense as his actions demonstrated a propensity for violence and disregard for the sanctity of human life. See Matter of Gutkaiss v. New York State Div. of Parole, 50 A.D.3d 1418 (3d Dept. 2008); see also Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017); Matter of Marcus v. Alexander, 54 A.D.3d 476, 476 (3d Dept. 2008).

Petitioner's due process claim is without merit

19. An inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69 (1980). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76; see also Duemmel v. Fischer, 368 Fed. Appx. 180, 182 (2d Cir. 2010).

The decision is sufficiently detailed

20. Contrary to Petitioner's claim, the Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); People ex rel. Herbert, 97 A.D.2d

128. This includes setting forth many of the factors considered and its conclusion that release at this time would be "incompatible with the welfare of society" and "so deprecate the seriousness of the offense as to undermine respect for the law as [his] actions demonstrate a propensity for violence and disregard for the sanctity of human life." See Matter of Murray v. Evans, 83 A.D.3d 1320 (3d Dept. 2011) (Board provided adequate statutory rationale); cf. Matter of Vaello v. Parole Bd. Div. of State of New York, 48 A.D.3d 1018, 1019 (3d Dept. 2008). "[W]hile less detailed than it might be," the decision does not violate the law. Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777 (2008), aff'g 51 A.D.3d 105, 110 (1st Dept.) (citing decision); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435 (1st Dept. 2013), rev'g 2013 N.Y. Slip Op 30265(U), 2013 N.Y. Misc. Lexis 552 (Sup. Ct. New York Co. Feb. 5, 2013) (citing decision). The Board's decision indicates that the instant offense was an escalation of his criminal history, which is lengthy and encompassing crimes in two different states. Further, the Board thought that the petitioner's declarations of remorse were not sincere. These are issues that are well within the Board's mandate set forth in the Executive law.

21. In making a parole release decision, the Board must consider the most current case plan that may have been prepared by DOCCS. 9 N.Y.C.R.R. § 8002.3(a)(12). An Offender Case Plan was prepared for Petitioner and made available to the Board at the time of the interview. The inmate was given the opportunity to raise additional matters during the interview and failed to raise any alleged deficiency in the case plan. See Matter of Vanier v. Travis, 274 A.D.2d 797 (3d Dept. 2000). If the inmate, who signed off on his case plan, was unsatisfied to the extent it did not address certain matters, he should have addressed the issue with the DOCCS counselor with whom he reviewed it.

22. Petitioner's complaint that the Board did not actually evaluate his suitability for release also is without merit. There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916 (3d Dept. 1992). The Board is presumed to follows its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256 (2000). The Board had extensive documentation before it and gave Petitioner the opportunity to discuss relevant matters during his interview. Inasmuch as Petitioner may now complain about the scope of the interview, the nature and extent of a parole interview are solely within the discretion of the Board. Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28-29 (1969). There also is no evidence the Board's decision was predetermined. Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

23. Contrary to Petitioner's claim, the Board regulations, which became effective July 30, 2014 and are consistent with 2011 memorandum issued by Board Chairwoman, sufficiently established the requisite procedures for incorporating risk and needs principles into the process of making parole release decisions. Matter of Byas v. Fischer, 120 A.D.3d 1586, 1586 (4th Dept. 2014); Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 1414, 997 N.Y.S.2d 872, 874 (4th Dept. 2014). Additionally, even uniformly low COMPAS scores would not have placed the onus on the Board to provide countervailing evidence to support its determination. Since 1977, the Board has been required to apply the same three-part substantive standard, namely, (1) whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law"; (2) whether release "is not incompatible with the welfare of society"; and (3)

whether release "will not so deprecate the seriousness of his crime as to undermine respect for law." Executive Law § 259-i(2)(c)(A). The 2011 amendments require the Board to incorporate risk and needs assessment principles to "assist" in measuring an inmate's rehabilitation and likelihood of success upon release. See Executive Law § 259-c(4). The statute thus does not create a presumption of rehabilitation based on a favorable risk and needs assessment, let alone a presumption of parole release. Indeed, while the Board might, for example, find an inmate sufficiently rehabilitated to satisfy the first prong of the standard—that the inmate will "live and remain at liberty without violating the law," the Board could also find, in its discretion, as it did here, that the inmate's release would be incompatible with the welfare of society or undermine respect for the law by deprecating the severity of the offense. The text of the statute therefore flatly contradicts the inmate's assertion that low COMPAS scores create a presumption of release. See Matter of King v. Stanford, 137 A.D.3d at 1397. The COMPAS is an additional consideration that the Board must weigh along with the statutory factors for purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d at 1108; accord Matter of Dawes v. Annucci, 122 A.D.3d at 1061. This is exactly what occurred here.

24. In conclusion, the Petitioner has failed to demonstrate the Board's decision was not made in accordance with the pertinent requirements or was so irrational as to border on impropriety. Parole release is a discretionary function of the Board, and the petitioner has not demonstrated any abuse by the Board has occurred.

25. As for petitioner's medical condition, the Executive Law contains provisions concerning the requirements that must be met for an inmate seeking release on medical parole due to suffering significant debilitating illnesses. See Executive Law §259-s. These requirements have

not been met by petitioner. Furthermore, we note that such release can only be granted after the Board considers whether, in light of the inmate's medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law. The inmate would also be subject to additional limitations and conditions.

26. As to the sentencing minutes, the Board requested them but did not receive them from the sentencing court. Instead, the Board received the enclosed affidavit of Keith Olarnick stating that they could not be found. Where the Board had made good faith efforts to obtain the sentencing minutes from the sentencing court, but was unsuccessful, and Petitioner failed to produce documentation that the sentencing minutes contained parole recommendation, the Board's failure to consider the sentencing minutes did not prejudice Petitioner and amounted to harmless error. Matter of Matul v. Chair of the New York State Board of Parole, 69 A.D.3d 1196 (3d Dept. 2010); Matter of Midgette v. New York State Division of Parole, 70 A.D. 3d 1039, (2d Dept. 2010); Glover v. The New York State Division of Parole, Index No. 2009-10824 (Sup. Ct., Orange Co., Jan. 19, 2010) (Bartlett, J.); Jose Andreo v. George Alexander, Index No. 185-09 (Sup. Ct., Albany Co., June 23, 2009)(Platkin, J.).

27. In the event of an unfavorable court ruling on the merits, the question of a remedy would arise. In such a situation, release on parole is not correct. Rather, the proper remedy is to remand the matter for a *de novo* interview. Matter of Quartararo v. New York State Div. of Parole, 224 A.D.2d 266 (1st Dept.), lv. denied 88 N.Y.2d 805 (1996); accord Matter of Ifill v. Evans, 87 A.D.3d 776 (3d Dept. 2011); Matter of Hartwell v. Div. of Parole, 57 A.D.3d 1139 (3d Dept. 2008); Matter of Siao-Pao v. Travis, 5 A.D.3d 150 (1st Dept. 2004), lv. denied 3 N.Y.3d 603 (2004). If

a *de novo* consideration is directed, the Court is asked give the Board at least 60 days to schedule and provide the *de novo* interview. Petitioner's apparent request for instructions to the de novo panel to release him is contrary to law. The weight to be accorded the requisite factors, and the ultimate parole release determination, is within the Board's discretion. Matter of Hamilton, 119 A.D.3d at 1271. A court "may not usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance." Matter of Steen v. Governor's Office of Emple. Rels., 1 A.D.3d 644, 645 (3d Dept. 2003).

28. For the foregoing reasons, the petition should be dismissed.

RECORD BEFORE RESPONDENT

1) Sentence and Commitment Order
2) Pre-Sentence Investigation Report. **** Please note, this document is exempt from disclosure pursuant to CPL §390.50 and is submitted for in camera review only.).**
3) Parole Board Report. **** Please note the page marked "confidential" at the top is confidential and is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted herewith for in camera review only.**
4) Transcript of Board Interview
5) Parole Board Release Decision Notice
6) Notice of Administrative Appeal
7) Brief on Administrative Appeal
8) Statement of Appeals Unit Findings
9) Administrative Appeal Decision Notice
10) Affidavit of Olarnick re: sentencing minutes
11) COMPAS instrument – redacted and unredacted versions.
12) Case Plan

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
March 13, 2019

Yours, etc.,

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