November 2019

Decision in Art. 78 proceeding - Hamilton, Samuel (2013-10-25)

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

SAMUEL HAMILTON,

Petitioner,

-against-

ORDER and JUDGMENT
INDEX NO. 3699-2013

NEW YORK STATE BOARD OF PAROLE, NEW YORK STATE DIVISION OF PAROLE, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, and ANDREA W. EVANS, CHAIRWOMAN OF THE NEW YORK STATE DIVISION OF PAROLE,

Respondents.

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

(Supreme Court, Albany County, Special Term, August 9, 2013)
(Hon. Eugene P. Devine, J.S.C., presiding)

APPEARANCES:

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Attorneys for Petitioner

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New York State Attorney General
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Albany, New York 12224
Attorney for Respondents

DEVINE, J.:

Petitioner, an inmate at the Fishkill Correctional Facility, commenced this special proceeding, pursuant to CPLR Article 78, to reverse the determination of respondents to deny petitioner's application for release to parole supervision and to hold petitioner for an additional 24 months before a reappearance before the Board of Parole (hereinafter Board). Respondents serve a verified answer in opposition to the petition. The Court heard oral argument on August 9, 2013.

Petitioner was convicted of Murder in the Second Degree and Robbery in the First Degree and sentenced to serve concurrent indeterminate prison terms of 18 years to life and 9 to 18 years, respectively, for his role as an accomplice in the armed robbery and shooting death of an off-duty New York City police officer in 1982. Following petitioner's ninth appearance before the Board in August 2012, the Board denied parole by written decision. Petitioner administratively appealed the determination and, although a decision on the appeal has not been rendered, petitioner is deemed to have exhausted his administrative remedies, thereby providing for judicial review of the underlying decision.[1]

The petition's primary assertion is that the Board failed to adequately consider the required statutory factors set forth in the recently amended parole statutes when it denied parole and, in addition, the Board erroneously focused exclusively on the nature of the instant crime, thereby rendering the determination arbitrary and capricious. At the outset, it is important to remember that parole decisions are discretionary and will remain undisturbed so long as the

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[1] see e.g. Matter of McCloud v New York State Div. of Parole, 277 AD2d 627, 628 n. 2 [3d Dept. 2000], lv denied 96 NY2d 702 [2001].

decision reflects a consideration of every statutory factor.[2] Executive Law § 259-i(2)(c)(A) instructs that parole is not to be granted merely as a reward for good behavior or achievements reached during imprisonment, but after having considered if there is a reasonable probability that he will be able to "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."[3] The statutory factors that the Board must consider include, among other things, the inmate's institutional record, academic and vocational achievements, completion of programming, release plans, family and community support and plans upon release, the seriousness of the crime, parole recommendations of the sentencing court, district attorney and defense counsel, the presentence report, any aggravating or mitigating factors, the inmate's activities following his arrest prior to confinement and prior criminal record.[4] Notwithstanding this list of mandatory considerations, nothing compels the Board to discuss each of the factors in its decision, nor is it required to give equal weight to each factor[5] and, in fact, the Board is free to place an emphasis on the serious nature of petitioner's offense in its decision.[6]

During petitioner's lengthy interview, the Board examined, in detail, petitioner's

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[2] see Matter of Burress v Evans, 107 AD3d 1216 [3d Dept. 2013].

[3] see also Matter of Gutkaiss v New York State Div. of Parole, 50 AD3d 1418 [3d Dept. 2008]

[4] see Executive Law § 259-i(2)(c)(A).

[5] see Matter of Vigliotti v State Executive Div. of Parole, 98 AD3d 789 [3d Dept. 2012]; Matter of Mentor v New York State Div. of Parole, 87 AD3d 1245 [3d Dept. 2011], lv denied 18 NY3d 803 [2012], cert denied 132 S. Ct. 2437 [2012].

[6] see Matter of Santos v Evans, 81 AD3d 1059 [3d Dept. 2011]; MacKenzie v Dennison, 55 AD3d 1092 [3d Dept. 2008].

exceptional institutional, educational and vocational training accomplishments, which included the receipt of Bachelor's and Master's degrees, his completion of programming during his long-term incarceration, and the numerous letters supporting his release from his spouse, family members, corrections officers and officials, including the superintendent of Fishkill Correctional Facility, and the Assistant District Attorney that prosecuted the case, causing one of the interviewing commissioners to observe that no other inmate had collected as many supportive letters from correctional officers, in particular.

Petitioner was commended for his impeccable institutional record and the Board discussed petitioner's established plans for employment and continued counseling following his release. The Board discussed, in detail, petitioner's exemplary psychological evaluation report and the COMPAS re-entry risk assessment which demonstrated that petitioner categorically posed the lowest risk of recidivism if released from prison and, additionally, noted that, prior to committing the instant offense, petitioner had no criminal record. After petitioner described his supportive spouse and family and his post-release plans and ambitions, a Board member remarked that he found petitioner to be "impressive" and stated that "anyone would be hard pressed to argue that you are not . . . rehabilitated."

Notwithstanding this finding, the Board considered the gravity of petitioner's crime and, although petitioner came to accept responsibility for his actions, the fact that petitioner had initially evaded arrest and refused to cooperate with law enforcement officials in the pursuit of two other men who were involved in the crime, ultimately allowing the men to avoid criminal conviction. Specifically, the Board found in its written decision that petitioner's "pattern of lies, selfishness, deceit at the time of your arrest, prosecution, and trial has left you as the only

culpable party for this terrible offense. While your record of accomplishment is very impressive, the immense and grievous nature of your violent offense overshadows and outweighs them." As this Court is unable to "effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior," the decision is affirmed.[7]

Petitioner also maintains that the Board's decision was based, in part, on erroneous information as the Board referenced an on-line petition coordinated by the New York Patrolmen's Benevolent Association. During the parole interview, a member acknowledged that there was a degree of public opposition to petitioner's release, however, the Court's review of the petition itself fails to illustrate how petitioner was prejudiced by allegedly "false information." The petition contains a list of inmates convicted of crimes involving the deaths of police officers and, under petitioner's name, describes the case as one where a police officer was "[s]hot off duty - trying to arrest perp robbing him." Nothing in this submission refutes or contradicts the nature of petitioner's conviction, the facts of which are well detailed in his Inmate Status Report and sentencing minutes, among other things, all of which were considered by the Board. Despite that petitioner's conviction related to his role as an accomplice and not as the primary actor in the crime and the issue as to which individual actually shot the officer remains unsettled after so many years, the fact is that petitioner was convicted for the murder of an officer. As the Board's decision was premised on established facts and was conveyed in an adequately detailed assessment of the applicable statutory factors it considered in reaching its determination, it

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[7] Matter of Comfort v New York State Div. of Parole, 68 AD3d 1295, 1296 [3d Dept. 2009].

cannot be said that said decision exhibited "'irrationality bordering on impropriety'" requiring its reversal.[8] While petitioner asserts that the Board failed to give proper weight to the high level of his rehabilitation and seeks an order in which the Court substitutes its own judgment in that regard, such a result is impermissible, nor is such a result warranted as the record demonstrates that the Board properly weighed petitioner's level of rehabilitation and other positive factors in its consideration of all of the mandatory statutory considerations.

An additional claim made by petitioner is that the Board has failed to comply with the statutory requirement that it establish written procedures to be used in making parole determinations. Under the 2011 amendments, Executive Law § 259-c, which sets forth the Board's functions, powers and duties, expressly required the Board to:

> [E]stablish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the [Board] in determining which inmates may be released to parole supervision.

After this amendment took effect, Chairwoman of the Department of Corrections and Correctional Supervision (DOCCS), Andrea W. Evans, released a memorandum that explained the statutory requirement and stated that DOCCS staff had been working with the Board in developing a transition accountability plan (TAP), which in its incorporation of "risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation."[9] Evans' memorandum instructs, as follows:

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[8] Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 77 [1980].

[9] Affidavit of Terrence X. Tracy, Exhibit A.

> With respect to the practice of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board were afforded training in July 2011 in the use fo the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool to understand the interplay between that instrument and the TAP instrument, as well as understanding what each of the risk levels mean.

Evans continued by reciting the list of statutory factors the Board must consider in making parole decisions and stated that:

> [I]n your consideration of the statutory criteria set forth in Executive Law § 259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

Petitioner's unsupported and conclusory contention that the Board failed to implement the above written procedures in deciding his parole application fails to require a reversal of the decision or the issuance of an order remitting this matter for a de novo interview before the Board, nor has petitioner demonstrated how the Evans' memorandum failed to comply with the "plain text of the 2011 amendments." Terrence X. Tracy, Counsel to the Board, avers that the Board considered, among other things, petitioner's COMPAS Re-Entry Risk Assessment which indicated petitioner's low risk for "future felony violence, arrest and absconding," and conceded that petitioner demonstrate a personal commitment to rehabilitation, however, that the test or consideration of any risk and needs assessment does not "divest the Board of its discretion and somehow require[] it to grant petitioner parole."

The Court turns, finally, to petitioner's assertion that the denial of parole constituted an unauthorized resentencing. Petitioner indicates that the sentencing court had indicated that parole should be possible after having served 18 years in prison and that, despite such recommendation, the repeated denial of parole by the Board is a settled determination that parole is not attainable. The Court disagrees.

The sentencing court made no parole recommendation during sentencing, nor has the Board expressly concluded that petitioner will never be granted release to parole supervision, nor given any indication of its refusal to do so. It is apparent from the hearing transcript that the members of the Board found it difficult to deny petitioner's application, however, they were ultimately compelled by the attendant facts and circumstances to deny parole at this reappearance. Based on the foregoing, the Court now concludes that the petition must be denied in its entirety.

Accordingly, it is

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

This memorandum shall constitute both the **ORDER and JUDGMENT** of the Court. This Original **ORDER and JUDGMENT** is being sent to the Office of the Attorney General. The signing of this Judgment shall not constitute entry or filing under CPLR 2220. Counsel for the respondents is not relieved from the applicable provisions of that section with respect to filing entry and notice of entry.

SO ORDERED
ENTER

DATE: 10/25/13
Albany, New York

EUGENE P. DEVINE, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated June 28, 2013.

2. Verified Petition for a Writ of Mandamus, dated July 1, 2013.

3. Affirmation of Moira Kim Penza, with attached Exhibits 1-11, dated June 28, 2013.

4. Answer of Respondents, dated July 19, 2013 and Affirmation of Tiffinay M. Rutnik, Assistant Attorney General, dated July 19, 2013, with attached Exhibits A-R [Confidential Submissions for in camera review returned to the Attorney General].

5. Affirmation of Terrence X. Tracy, dated July 15, 2013, with attached Exhibits A-F.

6. Reply Memorandum in Support of Petitioner's Article 78 Petition, dated August 8, 2013.