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Decision in CPLR Article 78 proceedings - Hopps, Michael (2018-08-01)

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parole and ordered a new hearing. The court noted that the denial was impermissibly based solely on the seriousness of the underlying offense.

After the hearing at bar, the Board denied the Petitioner parole.

The Board noted that the Petitioner's institutional programming indicated that he had made progress and achieved goals, which was to his credit. Further, that his disciplinary record appeared clean, and that his COMPAS risk score was low.

However, the Board held, parole was denied in light of the nature of the crime, the Petitioner's criminal history, and the "official opposition and significant and persuasive community opposition on file."

On administrative appeal, the Board's denial of parole was affirmed.

The Petitioner then sought CPLR article 78 review before this Court.

By Decision and Order dated June 25, 2018, this Court granted the petition and ordered a new hearing. The Court held:

the Board noted that the Petitioner's institutional record was favorable, that his disciplinary record appeared clean, and that his COMPAS risk score was low. Further, it did not conclude that he lacked insight into or remorse for his crime. Rather, the Board denied parole based on the nature of the underlying offense, the Petitioner's criminal history, and the "official opposition and significant and persuasive community opposition on file."

However, significantly, the Board did not identify, and the Court cannot otherwise determine, what materials the Board read or reviewed in determining that there was "official opposition and significant and persuasive community opposition on file" to the Petitioner's release. Thus, the Board's determination cannot be reviewed.

Indeed, although speculative, the only evidence in the record or otherwise submitted to the Court that might be argued to constitute such materials are statements made by the victim's sister at the time of sentencing (some 25 years ago), and documents generated around the same time. That is, the Court finds no even relatively current information that would support a finding that there was "official opposition and

significant and persuasive community opposition on file.” Given the Board must determine the Petitioner’s suitability for release at this time, it is irrationality bordering on impropriety for the Board to deny parole based on statements about the Petitioner’s suitability for release at or around the time of the underlying offense, some 25 years ago.

Thus, the Court ordered a new hearing.

The Motion at Bar

The Board now moves for leave to reargue the petition and, upon the same, for a denial of the petition.

The Board argues that the Court improperly *sua sponte* raised the issues of the contents and timeliness of the “official opposition and significant and persuasive community opposition on file.” Thus, it asserts, it was unable to respond to the same in the prior papers.

Indeed, the Board notes, statements by victims of crimes and other persons are confidential under the Executive Law, and may not be released without court order. Thus, the Board asserts, if the Court wants to review the relevant statements, which are confidential, it should issue an order to that effect, and the papers will be provided for *in camera* review.

In opposition to the motion, the Petitioner argues that the motion is procedurally barred because the Board did not submit a complete set of the original papers (*i.e.*, they did not append a copy of his Petition and supporting documents).

Moreover, he asserts, the motion was not served at least 8 days before it was returnable, and was not made returnable on a Wednesday, as is required by the Court’s part rules.

In any event, he argues, the motion is without merit. Indeed, he asserts, the determination at bar is typical of the boilerplate and disingenuous determinations being made by parole boards.

Discussion/Legal Analysis

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” *CPLR 2221(d)(2)*; *see also Cioffi v S.M. Foods, Inc.*, 129 A.D.3d 888 [2nd Dept. 2015]; *American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 926 N.Y.S.2d 640 [2nd Dept. 2011]. The movant must demonstrate that, as a result of such errors, the Court mistakenly arrived at its earlier decision. *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 110 [2nd Dept. 2017]. A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 916 N.Y.S.2d 821 [2nd Dept. 2011]. The determination to grant leave to reargue a motion lies within the sound discretion of the court. *American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 926 N.Y.S.2d 640 [2nd Dept. 2011].

A movant should include a complete set of the papers originally submitted on the motion, etc. to be reargued and/or renewed. *Plaza Equities, LLC v Lamberti*, 118 A.D.3d 687 [2nd Dept. 2014].

Here, the Board did not provide a complete set of papers. Thus, the Petitioner is correct that the motion is procedurally defective.

In any event, the Board’s arguments are without merit.

It would appear merely fundamental that, at a minimum, on a CPLR article 78 challenging a determination, the Board would submit a record that provides an evidentiary basis

for the stated reasons for the determination. This is especially true here, where the determination was mandated by an order of the Court finding that the stated reason for the preceding determination were not sufficient.

In any event, the Petitioner argued, *inter alia*, that the Board's determination lacked sufficient detail and a reasonable explanation for the same. This was sufficient to have required the Board to submit evidence of the claimed "official opposition and significant and persuasive community opposition on file." If the information was confidential, the Board could have submitted the information for *in camera* review only, as has been done on other cases on prior occasions.

Accordingly, and for the reasons cited herein, it is hereby

ORDERED, that the motion is denied.

The foregoing constitutes the decision and order of the court.

Dated: August 1, 2018
Goshen, New York

ENTER



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