Art. 78 Response - FUSL000131 (2020-12-27)

FUSL000131

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

In the Matter of the Application of
[redacted]

Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

TINA M. STANFORD, Chairwoman of the New York State Board of Parole,

Respondent.

VERIFIED ANSWER

Index No. [redacted]

Hon. Paul B. Wojtaszek, JSC

Respondent, by her attorney, Letitia James, Attorney General of the State of New York, Darren Longo, Assistant Attorney General, of counsel, for her Verified Answer to the Verified Petition in the above-entitled proceeding, respectfully alleges as follows:

1. Denies the allegations in ¶ 1 of the petition.

2. Denies the allegations in ¶ 2 of the petition.

3. Denies the allegations in ¶ 3 of the petition.

4. Admits the allegations in ¶ 4 of the petition.

5. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 5 of the petition.

6. Admits the allegations in ¶ 6 of the petition.

7. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 7 of the petition.

8. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 8 of the petition.

9. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 9 of the petition.

10. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 10 of the petition.

11. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 11 of the petition.

12. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 12 of the petition.

13. Admits the allegations in ¶ 13 of the petition.

14. Denies the allegations in ¶ 14 of the petition and respectfully refers the Court to the transcript of the parole hearing as the best evidence of its content, meaning, and import.

15. Denies the allegations in ¶ 15 of the petition and respectfully refers the Court to the parole order as the best evidence of its content, meaning, and import.

16. Denies the allegations in ¶ 16 of the petition.

17. Admits the allegations in ¶ 17 of the petition.

18. With respect to ¶ 18 of the petition, repeats and realleges her responses to ¶¶ 1-17 as if fully set forth herein.

19. Denies the allegations in ¶ 19 of the petition and respectfully refers the Court to Executive Law § 2850i(2)(c)(A) , and *Thwaites,* 934 NYS2d at 599, as the best evidence of their content, meaning, and import.

20. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 20 of the petition, and respectfully refers the Court to the cited materials as the best evidence of their content, meaning, and import.

21. Denies the allegations in ¶ 21 of the petition and respectfully refers the Court to the Board's written decision as the best evidence of its content, meaning, and import.

22. With respect to ¶ 22 of the petition, repeats and realleges her responses to ¶¶ 1-21 as if fully set forth herein.

23. Denies the allegations in ¶ 23 of the petition and respectfully refers the Court to the cited cases as the best evidence of their content, meaning, and import.

24. Denies the allegations in ¶ 24 of the petition.

25. Denies the allegations in ¶ 25 of the petition and respectfully refers the Court to the transcript of the hearing as the best evidence of its content, meaning, and import.

26. Denies the allegations in ¶ 26 of the petition.

27. With respect to ¶ 27 of the petition, repeats and realleges her responses to ¶¶ 1-26 as if fully set forth herein.

28. Denies the allegations in ¶ 28 of the petition and respectfully refers the Court to the cited cases as the best evidence of their content, meaning, and import.

29. Denies the allegations in ¶ 29 of the petition and respectfully refers the Court to the cited cases as the best evidence of their content, meaning, and import.

30. Denies the allegations in ¶ 30 of the petition and respectfully refers the Court to the record for review as the best evidence of its content, meaning, and import.

31. Denies the allegations in ¶ 31 of the petition and respectfully refers the Court to Executive Law § 259-i(2)(c)(A) and the parole decision as the best evidence of their content, meaning, and import.

32. Denies the allegations in ¶ 32 of the petition.

33. Denies the allegations in ¶ 33 of the petition.

34. With respect to ¶ 34 of the petition, repeats and realleges her responses to ¶¶ 1-33 as if fully set forth herein.

35. Denies the allegations in ¶ 35 of the petition and respectfully refers the Court to Executive Law § 259-i(2)(c)(A) and the cited cases as the best evidence of their content, meaning, and import.

36. Denies the allegations in ¶ 36 of the petition and respectfully refers the Court to Executive Law § 259-i(2)(c)(A) and 9 NYCRR 8002.3 as the best evidence of their content, meaning, and import.

37. Denies the allegations in ¶ 37 of the petition.

38. Denies the allegations in ¶ 38 of the petition.

39. With respect to ¶ 39 of the petition, repeats and realleges her responses to ¶¶ 1-38 as if fully set forth herein.

40. Denies the allegations in ¶ 40 of the petition and respectfully refers the Court to the cited cases as the best evidence of their content, meaning, and import.

41. Denies the allegations in ¶ 41 of the petition.

42. Denies the allegations in ¶ 42 of the petition.

43. With respect to ¶ 43 of the petition, repeats and realleges her responses to ¶¶ 1-42 as if fully set forth herein.

44. Denies the allegations in ¶ 44 of the petition and respectfully refers the Court to 9 NYCRR 8002.2(d)(7) as the best evidence of its content, meaning, and import.

45. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 45 of the petition.

46. Denies knowledge or information sufficient to admit or deny the allegations in ¶ 46 of the petition, and respectfully refers the Court to the record for review as the best evidence of its content, meaning, and import.

47. Denies the allegations in ¶ 47 of the petition and respectfully refers the Court to the cited cases as the best evidence of their content, meaning, and import.

48. Denies the allegations in ¶ 48 of the petition.

49. With respect to ¶ 49 of the petition, repeats and realleges her responses to ¶¶ 1-48 as if fully set forth herein.

50. Denies the allegations in ¶ 50 of the petition and respectfully refers the Court to Executive Law §259-i(2)(c)(A)(iii) as the best evidence of its content, meaning, and import.

51. Denies the allegations in ¶ 51 of the petition.

RECORD FOR REVIEW

52. Attached hereto is the record for review, Bates-stamped PAROLE 001-152.

53. Excluded from the record, but submitted to the Court for *in camera* review, is the Pre-Sentence Investigation Report.

54. The Report is exempt from disclosure pursuant to CPL § 390.50 and submitted for *in camera* review only.

55. An incarcerated individual is not entitled to the pre-sentence investigation report as a part of the Parole Board Release Interview process. Allen v. People, 243 A.D.2d 1039, 663 N.Y.S.2d 455 (3d Dept. 1997).

56. Only the sentencing Court which originally issued and/or adjudicated the report is authorized under CPL § 390.50 to release this highly confidential material. Blanche v. People, 193 A.D.2d 991, 598 N.Y.S.2d 102, 103 (3d Dept. 1993).

57. Also excluded from the record for review but submitted for *in camera* review is Part II of the Parole Board Report.

58. Pursuant to New York State Public Officers Law § 87(g), Part II (marked "confidential" at the top) is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted for *in camera* review only. *Zhang v. Travis*, 100 A.D.3d 829, 782 N.Y.S.2d 156 (3d Dept. 2004).

STATEMENT OF FACTS

59. The record for review sets forth the facts pertinent to the issues at bar.

60. Respondent sets forth a summary of the pertinent facts below.

61. Petitioner was sentenced to an aggregate term of 22 years to life upon his conviction of Murder in the second degree, Assault in the first degree, and Criminal Possession of a Weapon in the second degree.

62. Petitioner appeared for his Parole Board Release Interview (not a Hearing) on September 8, 2020.

63. Discretionary release was denied, and Petitioner was ordered held for another 24 months.

64. Petitioner perfected his administrative appeal on March 31, 2021.

65. The final appeal determination was mailed to Petitioner on June 28, 2021. This Article 78 proceeding followed.

66. The Article 78 papers were hand-delivered to the Division of Parole on October 28, 2021.

67. In the instant litigation, Petitioner reiterates the following claims from his administrative appeal: 1) the Parole Board gave impermissible weight to the seriousness of the past offense without citing any aggravating factors; 2) the Board's focus was backwards-looking; 3) the Board failed to consider his age and health issues; 4) the Board improperly considered Petitioner's failure to remember that a Commissioner on the panel had previously granted him release in 1997; 5) the decision was conclusory and contained boilerplate language; 6) the denial amounted to an illegal resentencing; 7) the Board failed to request and consider statements from Petitioner's defense counsel and the District Attorney; 8) the Board failed to consider the sentencing minutes; and 9) the Board failed to meaningfully consider the required statutory factors including Petitioner's reentry plans.

OBJECTION IN POINT OF LAW #1 – Transfer to Appellate Division

68. The petition raises an issue of substantial evidence as specified in question 4 of §7803 of the New York State Civil Practice Law and Rules ("CPLR").

69. The instant matter must therefore be transferred to the Appellate Division pursuant to CPLR §7804(g).

70. In any case, the determination at bar was supported by substantial evidence. See Objection in Point of Law #2.

OBJECTION IN POINT OF LAW #2 – Rational Decision

71. Respondent's actions in terminating petitioner were made in good faith and were not arbitrary or capricious or an abuse of discretion.

72. The test of whether an official action is arbitrary, capricious, or unreasonable is whether it is totally without reason. *Siciliano v. Scheyer*, 150 A.D.2d 460 (2nd Dept. 1989).

73. Even if the relevant regulations and directives could be interpreted in another way, that does not make respondent's interpretation irrational. *Matter of Elcor Health Servs. v. Novello*, 100 N.Y.2d 273, 280 (2003)

74. The question is simply whether there was any basis for respondent's decision.

75. An official action is arbitrary, capricious, or unreasonable only when it is "without basis in reason and is taken without regard to the facts." *4-M Holding Co. v. Town Bd.*, 81 N.Y.2d 1053, 1055 (1993), *quoting Mtr. of Pell v. Bd. of Ed.*, 34 N.Y.2d 222, 231 (1974).

76. Judicial review of an agency decision does not involve weighing the desirability of the action or choosing among alternatives. *Merson v. McNally*, 90 N.Y.2d 742, 752 (1997); *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990); *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 416 (1986).

77. In reviewing Respondent's determination, the Court must not substitute its own judgment for Respondent's. *Central N.Y. Coach Lines, Inc., v. Larocca*, 120 A.D.2d 149 (3rd Dept. 1986).

78. Rather, the Court must uphold Respondent's determination if that determination had a rational basis. *See Duquin v. Colucci*, 55 A.D. 2d 832 (4th Dept 1976); *McPartland v. McCoy*, 35 AD2d 641 (3rd Dept 1970).

79. Respondent's interpretation of its regulations and of the statutes with which it has been charged with enforcing, are entitled to great weight by the Court. *See Matter of Jennings v. Commissioner, NYS Dept. of Social Servs.*, 71 AD3d 98 (2nd Dept. 2010).

80. In addition, deference is accorded to an agency even where its interpretation might not be the most natural reading of a regulation. *See Elcor Health Services v. Novello*, 100 NY2d 273, 280 (2003).

81. Concerning statutory interpretation, an "agency's special expertise is entitled to deference and, 'if not irrational or unreasonable, the interpretation and construction given statutes by the body responsible for their administration should be upheld' (*citations omitted*)." *Pro Home Builders, Inc. v. Greenfield*, 67 AD3d 803, 805 (2nd Dept. 2009); *see also, Roberts v. Tishman Speyer Properties, L.P.*, 13 NY3d 270, 285 (2009).

82. In fact, where an agency's interpretation "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data" within the agency's particular expertise (*Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980)), great deference is accorded the agency's judgment (*See Matter of Incorporated Vill. of Lynbrook v. New York State Pub. Employment Relations Bd.,* 48 NY2d 398, 404 (1979) (prohibited subjects of bargaining); *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 NY2d 46, 50-51 (1974) (mandatory subjects of bargaining).

83. Pursuant to the Executive Law, 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 [incarcerated individual] 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).

84. Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific incarcerated individual, including, but not limited to, the individual's institutional record and criminal behavior.

85. While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." *Matter of Silmon v. Travis*, 95 N.Y.2d 470, 477 (2000).

86. Thus, it is well settled that the weight to be accorded each of the requisite factors 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).

87. The Board need not explicitly refer to each and every one of them in its decision, nor give them equal weight. *Matter of Campbell v. Stanford*, 173 A.D.3d 1012, 1015 (2d Dept. 2019); *Matter of Marszalek v. Stanford,* 152 A.D.3d 773 (2d Dept. 2017).

88. 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 McClain v. New York State Division of Parole*, 204 A.D.2d 456 (2d Dept. 1994).

89. 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).

90. 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 Kirkpatrick v. Travis,* 5 A.D.3d 385 (2d Dept. 2004); *Matter of Cruz v. Travis*, 273 A.D.2d 648 (3d Dept. 2000).

91. 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)).

92. 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 Marszalek v. Stanford,* 152 A.D.3d 773 (2d Dept. 2017).

The Board considered Petitioner's entire record.

93. The Board properly considered the record as a whole, including the interview transcript, reflecting that the Board considered the appropriate factors, including: the instant offenses of Murder in the second degree, Assault in the first degree, and Criminal Possession of a Weapon in the second degree; that Petitioner was on parole at the time of the instant offense; Petitioner's health issues including open heart surgery in 2015 and two heart attacks since then; Petitioner's criminal history featuring three previous state terms of incarceration including two weapon-related convictions; Petitioner's institutional efforts including a poor disciplinary record consisting of multiple Tier II and Tier III infractions, program accomplishments, and work as a teaching assistant; and release plans to seek assistance from a reentry organization.

94. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, and Petitioner's parole packet featuring release plans and letters of support and assurance.

95. 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).

96. In reaching its conclusion, the Board permissibly relied on the instant offenses committed while on parole, Petitioner's criminal history featuring prior failures while on parole and a pattern of weapon-related crime, and Petitioner's poor disciplinary record. *See Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision,* 151 A.D.3d 1622 (4th Dept. 2017); *Matter of Kenefick v. Sticht,* 139 A.D.3d 1380 (4th Dept. 2016); *Matter of Byas v. Fischer,* 120 A.D.3d 1586-87, 1586 (4th Dept. 2014); *Matter of Thurman v. Hodges,* 292 A.D.2d 872, 873 (4th Dept.), *lv. denied,* 98 N.Y.2d 604 (2002); *Matter of Fuchino*, 255 A.D.2d 914, 914 (4th Dept. 1998); *Matter of Karlin v. Cully,* 104 A.D.3d 1285, 1286 (4th Dept. 2013).

97. The Board also cited the COMPAS instrument's elevated score for history of violence. *See Matter of Espinal v. N.Y. State Bd. Of Parole*, 172 A.D.3d 1816 (3d Dept. 2019); *Matter of Bush v. Annucci,* 148 A.D.3d 1392 (3d Dept. 2017).

98. While Respondent does not agree that aggravating factors are always required to support emphasis on an inmate's offense, *Matter of Hamilton,* 119 A.D.3d 1268, the Board's decision here was based on the additional considerations outlined above.

Forward-looking Factors Claim

99. Petitioner's contention that the Board failed to comply with the 2011 Amendments to the Executive Law is likewise without merit.

100. Although Petitioner alleges the amendments represented a fundamental change in the legal regime governing parole determinations requiring a focus on forward-looking factors, this proposition is not supported by the language of the statute itself, considering the relatively

modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process.

101. The Board still must conduct a case-by-case review of each incarcerated individual by considering the statutory factors, including the instant offense. Executive Law § 259 i(2)(c)(A); *Matter of Montane v. Evans*, 116 A.D.3d 197, 202 (3d Dept. 2014).

102. Thus, even where the First Department has "take[n] the unusual step of affirming the annulment of a decision of [the Board]", it has nonetheless reiterated that "[t]he Board is not obligated to refer to each factor, or to give every factor equal weight" and rejected any requirement that the Board prioritize "factors which emphasize forward thinking and planning over the other statutory factors." *Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 29 (1st Dept. 2016).

The Board considered Petitioner's age and health issues

103. Contrary to Petitioner's assertion, the Board was clearly aware of and considered his advanced age and health issues.

104. At the end of the interview, Petitioner stated that he is "too old now [and has] a bad heart" before explaining to the Board that he had open heart surgery in 2015, two heart attacks since then, and has had stents put into his veins. (PAROLE 147.)

105. Petitioner is perfectly free to apply for special medical parole release. Executive Law §§ 259-r, 259-s.

106. It is a discretionary decision by the Commissioner of DOCCS (or his designee) whether to certify an incarcerated individual to the Board of Parole for medical parole consideration. *Matter of McDonnell v. Annucci*, 189 A.D.3d 1871 (3rd Dept. 2020); *Matter of Ifill v. Wright*, 94 A.D.3d 1259 (3d Dept. 2012).

The Board did not rely on Petitioner's failure to remember that a Commissioner on the panel had previously granted him release in 1997

107. There is no merit to Petitioner's claim that the Board improperly considered his failure to remember that a Commissioner on the panel had previously granted him release in 1997.

108. A review of the Board's written decision demonstrates that this played no role in the Board's determination. *Matter of Tatta v. State,* 290 A.D.2d 907, 908 (3d Dept.), *lv. denied,* 98 N.Y.2d 604 (2002); *see also Matter of Amen v. New York State Div. of Parole*, 100 A.D.3d 1230, 1230 (3d Dept. 2012).

109. There was no impropriety in the Board's inquiry.

110. The challenged exchange was aimed at Petitioner's insight into his prior opportunity on parole supervision. *See, e.g., Matter of Payne v. Stanford,* 173 A.D.3d 1577, 1578 (3rd Dept. 2019); *Matter of Hamilton v. New York State Div. of Parole,* 119 A.D.3d 1268, 1274 (3d Dept. 2014).

111. Petitioner himself acknowledged that he was still not deterred from committing the instant offense. (PAROLE 145-146.)

112. The transcript as a whole does not support Petitioner's contention that the parole interview was conducted improperly or that he was denied a fair interview. *Matter of Rivers v. Evans,* 119 A.D.3d 1188 (3d Dept. 2014); *see also Matter of Mays v. Stanford,* 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); *Matter of Bonilla v. New York State Bd. of Parole,* 32 A.D.3d 1070, 1071 (3d Dept. 2006).

The decision was sufficiently detailed

113. 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(b), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. *Matter of Applegate v. New York State Bd. of Parole*, 164 A.D.3d 996,

997 (3d Dept. 2018); *Matter of Kozlowski v. New York State Bd. of Parole*, 108 A.D.3d 435 (1st Dept. 2013); *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 v. New York State Bd. of Parole*, 97 A.D.2d 128 (1st Dept. 1983).

114. The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

Petitioner was not resentenced

115. Petitioner's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; *Matter of Murray v. Evans,* 83 A.D.3d 1320 (3d Dept. 2011); *Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit,* 281 A.D.2d 672 (3d Dept. 2001).

116. The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. *Matter of Burress v. Dennison,* 37 A.D.3d 930 (3d Dept. 2007); *Matter of Cody v. Dennison,* 33 A.D.3d 1141, 1142, (3d Dept. 2006), *lv. denied,* 8 N.Y.3d 802 (2007).

117. The petitioner has not in any manner been resentenced. *Matter of Mullins v. New York State Bd. of Parole,* 136 A.D.3d 1141, 1142 (3d Dept. 2016).

The Board solicited official recommendations and considered the sentencing minutes

118. Petitioner's contention that the Board failed to request and consider statements from his defense counsel and the District Attorney is likewise without merit.

119. A review of the record reveals recommendations from defense counsel and the District Attorney were properly solicited via request letters from the facility.

120. The fact that Petitioner's defense counsel "does not recall" being contacted, and the fact that the District Attorney did not respond to those requests, do not provide bases to disturb the decision.

121. The Board also referenced the sentencing minutes during the interview. (PAROLE 144.)

122. That the sentencing court did not impose the maximum sentence is not an indication that the sentencing court made a favorable parole recommendation. *Matter of Duffy v. New York State Div. of Parole,* 74 A.D.3d 965 (2d Dept. 2010).

The Board considered the requisite factors including release plans

123. Finally, inasmuch as Petitioner contends the Board failed to consider requisite factors, 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).

124. The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. *See Garner v. Jones,* 529 U.S. 244, 256 (2000).

125. The Board explicitly discussed Petitioner's reentry plans during the interview. (PAROLE 139-140).

Summary

126. In conclusion, Petitioner has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on

impropriety." *Matter of Silmon,* 95 N.Y.2d 470, 476 (2000) (*quoting Matter of Russo v. New York State Bd. of Parole,* 50 N.Y.2d 69 (1980)).

127. Parole release is a discretionary function of the Board, and the petitioner has not demonstrated any abuse by the Board has occurred.

128. In the event of an unfavorable court ruling on the merits, 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).

OBJECTION IN POINT OF LAW #3 – Non-Justiciable

129. The issue before the Court is non-justiciable in that it seeks to have the Court interpose itself into the management and operation of a public enterprise.

WHEREFORE, Respondent requests judgment dismissing the petition, granting judgment to Respondent, and granting such other and further relief as the Court may deem just and proper. In the event that the Court grants a *de novo* interview, Respondent requests at least 60 days' time in which to do so, as it is very difficult to schedule a *de novo* interview in a shorter time period due to the limited pool of commissioners who can participate, among other things.

Dated: December 27, 2021
Buffalo, New York

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
BY:

FUSL000131

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

In the Matter of the Application of
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Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

TINA M. STANFORD, Chairwoman of the New York State Board of Parole,

Respondent.

VERIFICATION

Index No. [redacted]

Hon, Paul B. Wojtaszek, JSC

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:

DARREN LONGO, an attorney admitted to practice in New York State, states under penalty of perjury:

1. I am an Assistant Attorney General in the office of Letitia James, Attorney General of the State of New York.

2. I have been assigned to defend this proceeding and I am acquainted therewith.

3. I have read the foregoing Verified Answer and know the contents thereof, and the same is true to my knowledge based on my discussions with individuals from the respondent's agency and my review of documents in the possession of that agency.

DATED: December 27, 2021
Buffalo, New York

DARREN LONGO