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### Decision in CPLR Article 78 proceedings - Howard, Morris (2003-07-09)

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In the Matter of the Application of  
MORRIS HOWARD, 75-A-2675,

Petitioner,

DECISION AND ORDER

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

Index No. 298-03  
RJI # 01-03-ST3308

-against-

BRION D. TRAVIS, Chairman of the  
New York State Board of Parole,

Respondent.

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(Supreme Court, Albany County, Special Term, February 28, 2003)

APPEARANCES:

BENNET GOODMAN, ESQ.  
Attorney for Petitioner  
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Suite 6  
Bronxville, New York 10708-6042

ELIOT SPITZER, ESQ.  
Attorney General, State of New York  
Attorney for Respondent  
(Stephen M. Kerwin, Esq.  
Assistant Attorney General of Counsel)  
The Capitol  
Albany, New York 12224

**Leslie E. Stein, J.:**

Petitioner commenced the instant CPLR Article 78 proceeding to review a determination made on September 5, 2001, denying him parole release for the third time and imposing a 24-month hold. Petitioner filed an administrative appeal, which affirmed the determination of the

parole board. Therefore, his administrative remedies were deemed exhausted. Petitioner asserts that the Board's determination was arbitrary and capricious and requests an Order directing respondent to grant him a new parole release hearing before the next available Board and to release him on parole supervision.

In his answer to the petition, respondent requested dismissal of the petition, raised an objection in point of law that petitioner has waived his claims by failing to raise his objections administratively and raised the following defenses: that the decision of the parole board was reached in full compliance with all statutory and regulatory requirements and must be sustained by the Court; and that the petition fails to state viable cause of action.

Petitioner alleges he is serving a twenty-five year to life sentence for incidents that occurred over 27 years ago, at a time when he was heavily addicted to drugs, and that he is now 57 years old and has been imprisoned for over 25 years. He alleges that he is an exceptional inmate who has fully rehabilitated himself. Petitioner has submitted a memorandum from the Superintendent of the facility where he is incarcerated, requesting special consideration for a rehearing from a previous denial of parole, as well as two volumes of letters attesting to petitioner's rehabilitation and in support of his release. In addition, petitioner has supplied copies of certificates, diplomas and awards that he has earned while incarcerated. Petitioner alleges that he has numerous employment opportunities if released and that he has extensive and caring family support.

Petitioner alleges that the prior two denials of parole were based upon his past criminal history, with no consideration of any other factors. He further asserts that the Board denied parole release at his most recent hearing exclusively on the nature and circumstances of his

underlying offenses and remote criminal history, that the Board had predetermined the case and that the denial of parole was improper because it failed to consider all of the statutory factors set forth in Executive Law §259-i(2)(c).

Respondent argues that the following issues raised by petitioner in this proceeding were deemed waived because they were not raised in his administrative appeal: that the decision was based on the wrong standard; that it was predetermined; that its effect was to illegally resentence petitioner in violation of the doctrine of separation of powers and double jeopardy; that it was a violation of due process because of political policies; and that the 24 month hold is excessive. A review of petitioner's administrative appeal brief demonstrates that he did argue that the decision was not based on the proper standards. Therefore, that issue has not been waived (see Watergate v Buffalo Sewer, 46 NY2d 52, 57). However, the other issues were not raised in the administrative appeal and, therefore, may not be raised for the first time in this proceeding (see Walker v New York State Div. of Parole, 203 AD2d 757).

Respondent argues that petitioner does not have a guaranteed right to parole and that the record demonstrates that the Board was aware of petitioner's achievements and decided that the nature of the crime outweighed petitioner's positive adjustments. Respondent also asserts that the Board may consider the potential danger an inmate would pose to the community if the inmate were to be released and may deny release if it determines that such release would undermine respect for the law and deprecate the seriousness of the crime. Respondent further argues that it is within the Parole Board's discretion to hold petitioner beyond the minimum sentence as long as it sets forth its reasons for doing so. Respondent asserts that the 24-month hold imposed by the Board is standard treatment for individuals denied parole and was not

excessive, that the decision was sufficiently detailed so as to inform petitioner as to the reasons for the denial of parole and that it satisfied the criteria set forth in Executive Law §259-i. Thus, respondent argues that petitioner has failed to demonstrate that the Board violated any positive statutory mandate in the rejection of his application for parole and asserts that the Board's determination was not arbitrary and capricious.

In reply, petitioner argues that the Court has a responsibility to strictly review the Board decisions to ensure that there is a logical nexus between the underlying offense and a finding that there is a reasonable probability that if an inmate is released he will not remain at liberty without violating the law or that his release is incompatible with the welfare of society or will so deprecate the seriousness of the crime as to undermine respect for the law, as set forth in Executive Law § 259-i[2][c]. Petitioner argues that noting achievements is not tantamount to considering them in a fair and reasoned individualized manner.

It is well established that "[p]arole release decisions are discretionary and, if made pursuant to statutory requirements, are not reviewable" (Matter of Sinopoli v New York State Bd. of Parole, 189 AD2d 960, 960, citing Matter of McKee v New York State Bd. of Parole, 157 AD2d 944; see Ristau v Hammock, 103 AD2d 944). It is proper and, in fact, required that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see, Matter of Weir v New York State Div. of Parole, 205 AD2d 906, 907; Matter of Sinopoli v New York State Bd. of Parole, supra; Matter of Dudley v Brown, 227 AD2d 863, as well as the inmate's criminal history (see, Matter of Farid v Travis, 239 AD2d 629; Matter of Cohen v Gonzalez, 254 AD2d 556). The Parole Board is not required to enumerate or give equal weight to each factor that is considered in determining the inmate's application (see, Matter of Farid v Travis, supra;

Matter of Moore v New York State Bd. of Parole, 233 AD2d 653) and Executive Law § 259-i(2)(c) does not require that parole release be granted merely as a reward for appellant's good conduct or achievements while incarcerated (Matter of Larrier v New York State Bd. of Parole Appeals Unit, 283 AD2d 700).

However, in the instant matter, it appears that the Parole Board applied the incorrect standard and did not truly consider the relevant criteria in making its decision. Furthermore, the decision was not sufficiently detailed to inform petitioner of the reasons for the denial of parole and it does not satisfy the requirements of Executive Law §259-i (cf Matter of Whitehead v Russi, 201 AD2d 825; Matter of Green v New York State Div. of Parole, 199 AD2d 677).

Specifically, while it is undisputed that the underlying crimes were serious and violent, they occurred 27 years ago and were coupled with a substance abuse problem. Rather than considering whether petitioner "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" (Executive Law § 259-i[2][c]), the Board's determination indicates that it concluded that "discretionary release does not serve societies[sic] interests and further incarceration protects society". There is no indication that petitioner currently has any substance abuse problems and neither the record nor the decision indicates how petitioner's release is incompatible with the welfare of society, that he would be likely to commit another crime, or that his release would undermine respect for the law. In fact, there are no negative factors that the Board could have considered other than the nature of the underlying offense and there are many factors which indicate that parole should be granted, including the fact that petitioner has been instrumental in quelling riots and facilitating good relations between inmates and prison administration officials.

Based upon the foregoing, the Court concludes that respondent's determination was made in violation of lawful procedure, is affected by an error of law and is irrational, arbitrary and capricious, and an abuse of discretion.

Accordingly it is

**ORDERED and ADJUDGED**, that the petition is granted to the extent that the matter is remanded for a new parole release hearing before the next available Board.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorney for petitioner, who is directed to enter this Decision and Order without notice and to serve respondent with a copy of this Decision and Order with notice of entry.

**SO ORDERED!**

**ENTER.**

Dated: July 9, 2003  
Albany, New York

  
Leslie E. Stein, J.S.C.

Papers Considered:

1. Order to Show Cause dated January 17, 2003;
2. Verified Petition dated December 4, 2002, with exhibits annexed;
3. Respondent's Answer dated February 12, 2003, with exhibits annexed;
4. Affirmation of Stephen M. Kerwin, Esq., dated February 12, 2003;
5. Reply Affirmation of Bennet Goodman, Esq. dated April 19, 2003, with exhibit annexed.