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November 2019

### Decision in CPLR Article 78 proceedings - Kennedy, William S. (2013-01-09)

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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

RECEIVED  
NYS OFFICE OF THE ATTORNEY GENERAL

JAN 17 2013

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
WILLIAM S. KENNEDY,

Petitioner,

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-against-

THE NEW YORK STATE DIVISION OF PAROLE,  
Respondent.

Index No. 9588/2012  
Motion Date: December 28, 2012

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The following papers numbered 1 to 7 were read on this petition for a CPLR Article 78 proceeding seeking to vacate the January 31, 2012 decision denying parole for petitioner and ordering a de novo parole hearing before a newly constituted parole board and for poor person status:

Order to Show Cause-Petition-Affidavit-Exhibits . . . . .	1-4
Answer-Exhibits . . . . .	5-6
Affirmation in Response . . . . .	7

Upon the foregoing papers it is ORDERED that the petition is disposed of as follows:

Petitioner seeks an order pursuant to CPLR § 7804 vacating the New York State Parole Board's (hereinafter "the Board") January 31, 2012 decision denying petitioner parole, and further seeks a de novo parole board hearing before a newly constituted board.

Petitioner contends that the Board failed to utilize a risk and needs assessment as amended in Executive Law § 259(c)(4) which became effective on October 1, 2011. While it is true that there was no formal COMPAS Risk Assessment prepared in this case, the fact remains that the Board considered the very things which the Risk Assessment called for, namely the inmate status report, institutional record, the personal interview with petitioner, and steps taken toward rehabilitation and the petitioner's likelihood of success if released. Therefore, petitioner's lacks merit.

Petitioner next claims that the Board failed to take into account all of the required factors in determining whether a parole applicant should be granted parole. Essentially, petitioner claims that the Board considered only two of the factors, namely the petitioner's criminal record and nature of the crime involved, as the basis for denying him parole. Petitioner claims that the Board's rationale was not given in detail and that it was given in conclusory terms in violation of the law.

Respondent contends that the Board's decision was based upon all of the statutory factors despite one being given more weight than the others. Respondent contends that there is a presumption of propriety which attaches to administrative proceedings such as the instant parole hearing, and that petitioner has not met its heavy burden of demonstrating that the Board's decision bordered on impropriety.

New York Executive Law § 259-i(2)(c)(A) requires the Board to have considered the following eight (8) factors in determining the propriety of granting parole to the petitioner:

- (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates;
- (ii) performance, if

any, as a participant in a temporary release program; (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 of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty-seven of the correction law; (v) any 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; (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 presentence 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.

Petitioner bears the threshold burden of establishing that the Board acted irrationally, bordering upon impropriety, in denying petitioner's application to be released on parole. *See, Samuel v Alexander*, 69 AD3d 861 (2<sup>nd</sup> Dept. 2010). As expressed by the Court of Appeals, the function of a parole board is deemed a judicial one, and will not be reviewable if performed according to the law. *See, Briguglio v New York State Board of Parole*, 24 NY2d 21, 29 (1969). In other words, as long as the parole board does not affirmatively violate a statutory requirement, it has absolute discretion in making its determinations and such determinations are not reviewable by the courts. *See, Id.*

In making its determinations, the Board was not required to give equal weight to the statutory factors outlined in Executive Law § 259-i(2)(c)(A), nor was it required to address each one of the factors in reaching its decision. *See, Samuel*, 69 AD3d at 861; *Alamo v New York State Division of Parole*, 52 AD3d 1163, 1163-1164 (3<sup>rd</sup> Dept. 2008); *Ward v New York State Division*

*of Parole*, 26 AD3d 712, 713 (3<sup>rd</sup> Dept. 2006). In fact, the Board was entitled to emphasize one of the factors more than the others in reaching its determination, specifically, the disturbing nature of the crimes themselves. *See, Karlin v Alexander*, 57 AD3d 1156, (3<sup>rd</sup> Dept. 2008); *Alamo*, 52 AD3d at 1163.

In the instant case, the minutes of the Board indicate not only that it considered the serious nature of the crime of which petitioner was convicted, but petitioner's institutional record (Respondent's Exhibit 4, pp. 6-7), petitioner's post-release plans (Respondent's Exhibit 4, p. 7), and his institutional accomplishments (Respondent's Exhibit 4, pp. 7-8). The Board also stated that there was a reasonable probability that petitioner would be incompatible with the safety and welfare of the community at large and deprecate the serious nature of the crime at issue which was the murder of strangling of a man during a home invasion and the tying up of his wife during that robbery. So long as the Board considered the relevant statutory factors and did not consider only one to the exclusion of the others, the Board cannot be considered to have acted irrationally bordering upon impropriety. *See, Samuel*, 69 AD3d at 861. In this case, the Board's emphasis on the serious nature of the offense, in conjunction with the record before this Court of the other relevant statutory considerations it was required to factor into its decision, does not, in and of itself, render its decision improper. *See, LaSalle v New York State Division of Parole*, 69 AD3d 1252, 1253 (3<sup>rd</sup> Dept. 2010). In fact, the Board does not even have to specifically discuss all of the factors it considered, nor was it required to give them equal weight. *See, Id.; Young v New York State Division of Parole*, 74 AD3d 1681 (3<sup>rd</sup> Dept. 2010); *Alamo*, 52 AD3d at 1163-1164; *Ward*, 26 AD3d at 713. The record reveals that in denying petitioner's application for parole release, the Board considered all relevant factors, including the gravity of petitioner's instant

offense (*see*, Executive Law § 259-i[2][c]; *Matter of Rhoden v New York State Div. of Parole*, 270 AD2d 550).

Thus, the petitioner failed to meet his burden of establishing his allegations of irrational conduct by the Board bordering upon its impropriety in denying petitioner's application for parole. Petitioner's remaining contentions are equally unavailing. Petitioner's petition is therefore denied in its entirety.

Additionally, \$50.00 shall be deducted from the petitioner's inmate account for the reduced filing fee in this matter in accordance with the order signed coterminously herewith.

The foregoing constitutes the decision and order of the court.

Dated: January 9, 2013  
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT,  
A.J.S.C.  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE