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To commence the statutory time
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
--X

In the Matter of

GARY PERFETTO,

Petitioner,

DECISION AND ORDER
INDEX NO.: 5247/2015
Returnable: 10/16/15

-against-

TINA STANFORD, as the Chairwoman of the State Board of Parole,

Respondent.

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

SCIORTINO, J.

The following papers numbered 1 to 29 were considered in connection with the applications by petitioner for an order and judgment pursuant to Civil Practice Law & Rules Article 78:

PAPERS	NUMBERED
Form Affidavit for Poor Person Status	1
Affidavit in Support of Order to Show Cause	2
Affirmation in Response to Poor Person Application	3
Order to Show Cause/Verified Petition/Exhibits A-I	4 - 14
Answer and Return/Exhibits 1-11	15 - 26
Verified Reply/Exhibits A-B	27 - 29

Petitioner Gary Perfetto (Petitioner) seeks an order and judgment pursuant to Civil Practice Law & Rules Article 78 granting the following relief: (A) annulment of the Parole Board's February

25, 2015 Decision denying him parole; and (B) a *de novo* parole hearing.[1]

Background and Procedural History

Petitioner is serving an indeterminate sentence of 20 years to life, after conviction for the 1980 crimes of second degree murder and first degree robbery. He was first convicted in 1982, but his conviction was reversed and remanded for new trial; and he was convicted again of the same charges in 1985. He has been in prison for approximately thirty years.

He first appeared before the Parole Board in 2004, and appeared again in 2006, 2008, 2009 and 2011. Each time parole was denied. Petitioner's November 2011 denial decision found:

> After a review of the record and interview, the panel has determined that if released at this time, your release would be incompatible with the welfare of society and would so deprecated the serious nature of the crime as to undermine respect for the law. This decision is based on the following factors: your instant offense is murder 2 and robbery 1. Your crime involved you causing the death of a victim by striking him in the head and body with a blunt instrument during the commission of a robbery. The victim was struck with a dozen blows to the head and then dragged and dumped into a loading bay. The victim left behind a wife and children who will forever be affected by this horrible crime. The Board notes your letters of support, program accomplishments and vocational skills. All factors considered, however, your release at this time is not appropriate.

An Article 78 petition was filed after the November 2011 denial, but denied by the Supreme Court (Bartlett, A.J.). However, the denial was reversed and vacated by the Appellate Division, which remanded the matter for a *de novo* hearing. That hearing was held in February 2014, and is not the subject of the within matter.

On or about February 25, 2015, petitioner was given the due course (bi-annual reappearance)

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[1]In his Verified Reply, petitioner also indicates his intention to seek sanctions against Respondent.

hearing he would have had in November 2013, but which was adjourned pending his appeals. During the course of that hearing, petitioner acknowledged that he no longer maintained his innocence as to the verdicts, and that, when he testified at his first trial that he did not commit the crime, he had lied. The panel spent significant time questioning petitioner about the circumstances of his crime, during which he acknowledged having "targeted" his victim as "easy." He also testified that he had never injured or killed any other person. The panel took note of petitioner's COMPAS assessment, which they characterized as a "tool, a resource, in an advisory way" to measure petitioner's rehabilitation for re-entry into the community. The COMPAS scores placed petitioner at low risk across the board for violence, arrest or absconding.

The Board noted petitioner's acceptance into a housing program where, if released, petitioner could use his skills in air-conditioning, refrigeration, plumbing and heating. They further questioned petitioner about his current outside clearance, which allows him to do plumbing and heating throughout the facility, and his work with community service agencies in the community. The petitioner also instituted a "puppy program" at Otisville. Petitioner was questioned about his "nice letters of support" from family members. At the conclusion of the hearing, he expressed his remorse and took full responsibility for his actions. The Panel's determination was a further denial with a 24-month hold to November 2015. The February 25th Decision found:

> Following careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered: your instant offenses in Queens in July 1980 involved murder 2nd and robbery 1st. Your criminal history indicates the instant offenses to be your only offenses of record. Your institutional programming indicates progress and achievement which is noted to your credit. Your disciplinary record appears clean and is likewise noted. Required factors in the file have been considered. Required

statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community re-entry. Your discretionary release, at this time, would thus not be compatible with the welfare of society at large, and would tend to deprecate the seriousness of the instant offenses and undermine respect for the law.

Petitioner filed an Administrative Appeal of the Board's February 25, 2015 decision. No administrative decision was rendered on his appeal for more than four months[2]. This entitled petitioner to seek judicial relief pursuant to 9 NYCRR §8006.4(c).

Petition and Answer

The Verified Petition originally filed together with his Order to Show Cause on or about July 13, 2015 asserts that petitioner's release was denied solely on the basis of the seriousness of his offense, and the two conclusions reached by the Board are set forth in impermissibly conclusory terms, unsupported by the facts. Petitioner asserts that the determination was arbitrary and capricious.

Essentially, petitioner argues that the February 25, 2015 Decision employs the same language and conclusions which were vacated by the Appellate Division in the appeal of his 2011 hearing. The determination lacks explanation or analysis of how the Board determined that petitioner's release would be incompatible with the welfare of society and would deprecate the seriousness of his crime so as to undermine respect for the law.

[2]An undated Statement of Appeals Unit Findings and Recommendations, recommending the determination be affirmed, is appended to the Answer and Return as Exhibit 7.

Petitioner further alleges that the Board's decision fails to meet the standards of Executive Law §259-i(2)(A) and 9 NYCRR §8002.3(d), which require that the reasons for the denial of parole be stated in detail. He asserts that the decision was wholly conclusory and fails to detail its reasoning as required by the Executive Law. Pointing to authority which requires the Board's conclusions to be set forth in sufficient detail to enable appropriate judicial review, petitioner further argues that the Board's conclusions are contrary to law, as they lack a sound basis in reason or with regard to the facts. Specifically, they ignore the COMPAS Assessment; the fact that the sentencing Court determined that a 20-year to life sentence was appropriate; petitioner's completion of many required and optional programs; his record of having remained free on bail without failing to attend at court as required; and his satisfactory outside work record and accomplishments.

Because the Board's determination mirrors the language deemed unacceptable by the Appellate Division in its 2014 Decision, petitioner asserts he is entitled to a *de novo* hearing.

In its Answer, respondent first argues that the failure of the Appeals Unit to timely issue a Findings Statement does not render the underlying decision defective or invalidate the Board's determination. The Court notes that this was not the position asserted by petitioner. However, respondent goes on to argue that petitioner's attempt to raise in the Article 78 proceeding issues which were not preserved in the administrative appeal is improper. On the administrative appeal, petitioner asserted (1) the wrong hearing date was referenced in the determination; (2) the Board failed to properly weigh and consider the required statutory factors and made its determination solely on the basis of his underlying crimes; and (3) the Board's decision was made without sound basis in reason or law. Thus, respondent asserts, this Court should not consider petitioner's arguments

concerning the conclusory nature of the Board's conclusions, or its failure to consider the COMPAS report, the determination of the sentencing court, petitioner's work record or his conduct while on bail. However, with respect to the argument about sentencing, respondent replies that the failure to impose the maximum sentence may not be interpreted as a favorable parole recommendation.

In all other respects, respondent argues that petitioner's claims are without merit. The Board is entitled to exercise its independent judgment in weighing any statutory factor in making its determination. In so doing, the Board may place greater weight on an inmate's criminal conduct than upon his institutional adjustment and release plans; and a denial based on the determination that the inmate's achievements are outweighed by the severity of his crimes is neither arbitrary nor capricious, but is within the Board's discretion. Parole is not a reward for good conduct or achievements while incarcerated.

Respondent further asserts that the Board is not required to articulate the weight accorded to each factor. In the instant matter, respondent asserts that the record reveals that the Board considered all the required factors and supported its determination that the extremely serious nature of the offense was incompatible with the welfare of society. If the Board demonstrates that it has weighed the statutory factors involved in release determinations, its decision may not be disturbed.

The Court may not consider petitioner's argument that "nothing of a negative nature has changed in the petitioner's record since the Appellate Division['s determination]." The Board is mandated, on each determination, to consider and review all of the criteria in Executive Law §259-i(2)(c).

The 2015 determination is distinguishable from the 2011 determination based on the language

employed. In the 2011 decision, there was "vehement" language used to detail the circumstances of petitioner's crimes and a complete lack of detail about the other factors. In contrast, the 2015 determination is "considerably more measured... clearly giving equal emphasis to all factors listed." Appearing to acknowledge that the Board's determination "could have been stated more artfully," respondent reiterates that semantic differences between the determination and the statute is permissible. While the 2011 decision merely stated, without giving a reason, that petitioner's release would be inappropriate, the 2015 decision went on to state that release was not warranted because of "concern for the public safety and welfare." Thus, respondent asserts, the conclusion was properly supported by rationale.

Petitioner's Reply points out that his administrative appeal did, in fact, raise and preserve the argument that the Board's decision was conclusory. Moreover, the argument that the COMPAS, work history, sentencing, and conduct while on bail arguments were unpreserved is also unpersuasive, since these are, in fact, among the factors the Board is required to consider in making its determination. The remainder of his Reply reiterates his previously articulated positions that the determination was not based in fact or compliant with the law, and that the Answer and Return were calculated to mislead and deceive, thus entitling the Court to levy sanctions.

Discussion

Standards for Review:

It has become fundamental that release on parole is a discretionary function of the Parole Board. Provided that the determination of the Board follows statutory standards for such decisions, it will not be disturbed by a court, absent a showing that the decision is "irrational bordering on

impropriety" and, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 NY 2d 470 (2000); *Matter of King v. NYS Div. of Parole*, 190 AD2d 423 (1st Dep't 1993), *aff'd*, 83 NY 2d 788 (1994); *Siao-Pao v. Dennison*, 51 AD3d 105 (1st Dep't 2008)

Executive Law §259-i(c)(A) provides that discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but rather after considering if there is a reasonable probability that, if such inmate 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 the crime as to undermine respect for the law. *Matter of King*, 190 AD2d at 430

The Parole Board is required to consider a number of factors in determining whether an inmate should be released. Executive Law §259-i requires the court to consider factors including, but not limited to, the institutional record (including program goals and accomplishments, vocational education, academic achievements, etc); release plans, including community resources, employment, education and training and available support services; any deportation order issued; the seriousness of the offense, with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the attorney and the pre-sentence probation report, and the prior criminal record. *Matter of Malone v. Evans*, 83 AD3d 719 (2nd Dep't 2011); *Siao-Pao v. Dennison,* 51 AD2d at106 For that reason, the Court rejects respondent's arguments that petitioner did not preserve the issues regarding the Board's failure to consider relevant factors in his administrative appeal.

The Parole Board's decision need not specifically refer to each and every factor nor must it

give each factor equal weight. *Matter of King,* 190 AD2d at 431 The weight to be accorded to each statutory factor lies solely within the discretion of the Board. *Siao-Pao v. Dennison,* 51 AD3d at 108 However, it is incumbent on the Board to actually consider each applicable statutory factor and, "where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene." *Matter of King,* 190 AD2d at 431 Executive Law §259-c[4] requires the Board to incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release. The 2011 Amendments to the Executive Law mandated the Parole Board to adopt procedures to assist members in determining which inmates may be released to parole supervision. *Matter of Thwaites v. NYS Board of Parole*, 34 Misc. 3d 694 (2011)

Where the Board's determination includes consideration of all relevant statutory factors, including the criminal history, the instant offense, the [lack of] disciplinary infractions since the last appearance, program and educational accomplishments and post-release plans, further judicial review is precluded. *Matter of Borcsok v. NYS Division of Parole*, 34 AD3d 961 (3rd Dep't 2006)

Conversely, however, when the Board denies parole, it is required to inform the inmate in writing of the factors and reasons for the denial, and "[s]uch reasons shall be given in detail and not in conclusory terms." Executive Law §259-i[2][a]; *Matter of Mitchell v. NYS Division of Parole*, 58 AD3d 742 (2nd Dep't 2009) A detailed written explanation is necessary to enable intelligent judicial review of the Board's decision. *Matter of West v. NYS Board of Parole*, 41 Misc. 3d 1214(A) (2013) The absence of such a detailed decision inappropriately forecloses the possibility of intelligent review. *Mayfield v. Evans*, 93 AD3d 98, 100 (1st Dep't 2010) The decision to deny

parole cannot be based solely on the nature of the underlying offense. *Winchell v. Evans*, 27 Misc. 3d 1232(A) (2010), citing *Wallman v. Travis*, 18 AD 3d 304, 307-08 (1st Dep't 2005)

A Parole Board's denial of parole which focused almost exclusively on the inmate's crime, while failing to take into account and fairly consider any of the other relevant statutory factors which categorically supported inmate's release, was arbitrary and capricious. Similarly, the Board's failure to explain, other than the facts of the crime, why the inmate's release was incompatible with public safety and welfare, could not be supported. *Matter of Morris v. NYS Dep't of Corrections and Community Supervision*, 40 Misc. 3d 226 (2013)

In the instant matter, the Court cannot find, as a matter of law, that the Board's hearing focused exclusively on petitioner's crime. In the hearing, the Board raised the issue petitioner's community service, his lack of disciplinary matters, his outside work clearance, and his achievements. Nor can the Court find that the Board ignored the COMPAS assessment in the interview, noting, as it did, the positive results it considered.

However, the decision of the Board is another matter. Although the serious nature of the crime remains "acutely relevant" in determining whether petitioner should be released, the Board must still take into account and fairly consider the other relevant statutory factors. *Matter of West,*, 41 Misc. 3d at 1214(A)

Petitioner's 2011 parole denial, vacated by the Appellate Division, and his 2015 denial contain nearly identical justification, i.e., petitioner's release would be incompatible with the welfare of society and would deprecate the seriousness of the instant offenses and undermine respect for the law. Respondent points to the addition of the "concern for the public safety and welfare" in the

language of the 2015 determination. Such language, however, is no more explanatory or detailed than the "boilerplate" justification echoed in nearly every parole denial decision.

It is particularly ironic that the "boilerplate" language follows a recitation of petitioner's positive factors, including his lack of other criminal history, his progress and achievements, his clean disciplinary record, etc., and then goes on to conclude that his discretionary release is ***thus*** incompatible with the welfare of society at large. (Emphasis added) Little could be more contradictory and less informative.

In *Matter of Thwaites,* the Board's decision stated:

> **After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted**, as is your improved disciplinary record. **This panel remains concerned, however, about** your history of unlawful conduct, the gracity (sic) of your instant offense and the disregard displayed for the norms of our society, **when considered with the required relevant factors leads to the conclusion that** your discretionary release is inappropriate at this time and **incompatible with the welfare of the community** and would so deprecate the seriousness of your crime as to undermine respect for the law. (Emphasis added) (34 Misc. 3d at 696)

The Court in *Thwaites* found that this language, although referencing "positive" factors, addressed, almost exclusively, the nature of petitioner's crime. (34 Misc. 3d at 700) While the petitioner's accomplishments and release plans were noted, "the Board focused on the circumstances of the crime committed twenty-five years ago." *Id.*

Reasoning that employs past-centered rhetoric and not future-focused risk assessment analysis is inconsistent with the rational determination of the inquiry at hand, to wit, whether the inmate can live and remain at liberty without violating the law and whether his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to

undermine respect for the law. *Id.*, citing Executive Law §259-i[2][c]

The Court in *Matter of Thwaites* found the Board's decision to be arbitrary and capricious, irrational and improper based on the Board's failure to articulate any rational, non-conclusory basis, other than its reliance on the seriousness of the crime, as to why the Board believed his release was incompatible with the welfare of society and would deprecate the seriousness of his crime so as to undermine respect for the law. *Id.* at 701

Similarly, in *Matter of Morris*, the Court found that a "passing mention" of petitioner's accomplishments and document submissions, and conclusory statements that statutory factors were considered were "woefully inadequate" to demonstrate that the Board weighed or fairly considered the required statutory factors. 40 Misc. 3d at 234; *Matter of West,* 1214(A)

Although the Board need not specify each statutory factor in its decision, it must do "more than merely mouth" those criteria, particularly where, as here, factors recited in the interview, other than the crime itself, militated heavily in favor of release. *Weinstein v. Dennison,* 7 Misc. 3d 1009(A) (2005) The Parole Board's determination must be sufficiently detailed to apprise petitioner of the reasons for the denial of his parole. *Matter of Stokes v. Stanford*, 2014 NY Slip Op. 50899(U) (June 9, 2014), *citing, Matter of Davis v. Travis*, 292 AD2d 742 (3rd Dep't 2002)

In this matter, the Board's decision appears to have accorded no weight to any factor apart from the seriousness of petitioner's offense. *See, Winchell v. Evans,* 27 Misc. 3d 1232(A} For respondent to have simply restated the usual and predictable language contained in so many parole release decisions with no specificity or other explanation to justify parole denial is unacceptable. *Bruetsch v. NYS Department of Corrections and Community Supervision*, 43 Misc. 3d 1223(A)

(5/11/2014) To simply defer to its conclusion leaves the reviewing court to guess at the basis for the Board's denial. *Vaello v. Parole Board Div. of the State of New York*, 48 AD3d 1018, 109 (3rd Dep't 2008); *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013)

On the basis of the foregoing, the Court concludes that petitioner has adequately established his contention that the Parole Board's determination was arbitrary and capricious, irrational and improper. Having so determined, the Court need not reach any of the other arguments advanced by petitioner. The confidential records submitted to the Court for *in camera* review are hereby sealed.

The February 25, 2015 decision of the Board of Parole is hereby vacated, and this matter is remanded to the Board of Parole. Within 30 days of the date of the service of a copy of this Order, with notice of entry, petitioner shall be entitled to a new parole hearing consistent with this decision and the mandates of Executive Law §§259-c and 259-i. The new hearing shall be held before a different panel of the Parole Board.

Petitioner's application to proceed as a poor person is granted, without opposition. Petitioner shall pay a reduced filing fee of $15 for the costs of this application.

This decision shall constitute the order of the Court.

Dated: December 3, 2015
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.