Decision in CPLR Article 78 proceedings - Povoski, Jr., Frank J.

25/4

STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

In the Matter of the Application of

FRANK J. POVOSKI, JR.,

Petitioner,

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

DECISION & ORDER
Index No. 7391-14

-against-

LISA BETH ELOVICH, ANDREA W. EVANS, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, NEW YORK STATE BOARD OF PAROLE.

Respondents,

Appearances:
Frank J. Povoski, Jr.
DIN # 05B2531
Great Meadows Correctional Facility
11739 Route 22
P.O. Box 51
Comstock, New York 12821
Attorney for the Petitioner

Hon. Eric T. Schneiderman, Attorney General State of New York
Melissa A. Latino, Assistant Attorney General of Counsel
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Albany, New York 12224-0341
Attorney for the Respondent

NICHOLS, A.J.S.C.

By petition dated March 21, 2014, the Petitioner challenges the determination of the Respondent denying his release to parole supervision. The Respondent has submitted papers in opposition and, in turn, seeks the dismissal of the petition, while the Petitioner has submitted numerous affidavits in reply.

The Petitioner was convicted of the crimes of Robbery in the Second Degree,

Assault in the Second Degree, Conspiracy in the Second Degree (4 counts), Promoting Prison Contraband in the 1st Degree, Arson in the 3rd Degree (4 counts), Criminal Mischief in the Second Degree and Driving While Intoxicated (2 counts/E Felony), and sentenced to an indeterminate term of 8 1/4 to 18 years in prison.[1] On March 20, 2013, the Petitioner appeared before the Board of Parole for an interview pursuant to his application for release to parole supervision. The Petitioner's application was denied by decision dated March 22, 2013, and the Board of Parole ordered that the Petitioner be held for reappearance in twenty-four months. The Petitioner filed a notice of appeal in a timely manner and went on to administratively appeal the denial of his application for release and perfected and submitted his appeal to the appeals unit on or about August 8, 2013. The Petitioner's appeal has not been decided to date, and in any event not within the 4 month time-frame established by regulation. *See*, 9 NYCRR § 8006.4 (c). Therefore, the Petitioner's available administrative remedies have been exhausted. *See*, Folks v. Alexander, 58 A.D.3d 1038, 1039.

In denying the Petitioner's application for release to parole supervision the Board stated, in essence:

> *After a review of the record and interview, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release*

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[1] Since adjusted to 7 1/4 to 18 years in prison by virtue of the November 8, 2013, Memorandum and Order rendered by the Supreme Court, Appellate Division, Fourth Department in People v. Povoski, 111 A.D.3d 1350, which directed that the sentences for the convictions for Robbery in the Second Degree, Forgery in the 2nd Degree and Assault in the Second Degree, be served concurrently rather than consecutively.

would be incompatible with the welfare of society.

The Panel has considered your institutional adjustment, including discipline and program participation. Required statutory factors have been considered, including your risk to society, rehabilitation efforts and your need for successful re-entry into the community, Your release plans have also been considered. More compelling, however, is your long pattern of illegal conduct in the I.O which includes arson, forcible theft, assault and DWI offenses. During the interview you minimized your responsibility for your crimes. Of concern is your long history of alcohol abuse.

While incarcerated you incurred multiple Tier 3 infractions. Your infractions included threats and fighting.

The Board notes your well prepared parole packet which includes your goals, resume, letter of support and letters of assurance. The Board notes your program accomplishments including ASAT and Art. All facts considered, your release at this time is not appropriate.

These three paragraphs are in error.

~~*You are serving time for the serious offenses of murder second, criminal possession of a weapon second, assault second and criminal possession of a weapon third, in which you acting in concert shot two people, one of who died.*~~

~~*Since your last Parole Board appearance, you have incurred a number of tickets, including a Tier 3 for contraband, resulting in the imposition of SHU time among other sanctions. Your disciplinary history is noted and needs improvement.*~~

~~*This Panel remains concerned about your violent conduct and poor compliance with DOCS rules. Accordingly, this Panel concludes that discretionary release at this time is not warranted. Parole denied.*~~[2]

Initially, to the extent that the Petitioner's application asserts that the Respondent's determination was arbitrary and capricious inasmuch as the Respondent failed to adhere to the 2011 amendment to Executive Law § 259-c (4), it is unavailing. Executive Law

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[2] The Court has not quoted the Board's determination due to the fact that the Court has corrected the determination as to capitalization and punctuation.

§ 259-c (4)'s directive that the Board of Parole "establish written procedures for its use in making parole decisions as required by law," is satisfied by the written memorandum employed by the Respondent to that effect. *See*, Montane v. Evans, 116 A.D.3d 197, 202-203. Furthermore, inasmuch as the Amendment's call for 'written procedures' did not necessitate the promulgation of formal rules and regulations that would need to be filed with the Secretary of State, the lack of such promulgation and concomitant filing is of no moment. *See, id.*

Turning to the balance of the Petitioner's application, the Court finds that the Parole Board did not err in considering the Petitioner's Tier III disciplinary infractions. Although the Petitioner asserts that he was not provided with the institutional rules and records in violation of Correction Law § 138 (3)(5), and although the Petitioner provided some evidence that he raised that issue in the course of disciplinary hearings held relative to those infractions, the Petitioner has failed to make the requisite demonstration that he pursued that issue and exhausted the administrative remedies available to him. *See*, 7 NYCRR § 254.8; Johnson v. Coughlin, 205 A.D.3d 537, 538; Hop Wah v. Coughlin, 153 A.D.2d 999, 1000. Instead, the Petitioner is attempting to use the present Article 78 proceeding as a vehicle to raise a collateral issue that was amenable to review in its own right if pursued, as it was required to be, according to the statutory and regulatory remedies available to the Petitioner. *See, id.*

The Court further finds that the Parole Board followed the applicable statute inasmuch as it considered the required factors enumerated by Executive Law § 259-i (2)(c)

in assessing the Petitioner's application and in rendering its determination. In this regard, the Court notes that the Parole Board referenced and discussed with the Petitioner, *inter alia*, the contents of his COMPAS Reentry Risk Assessment, the extent and nature of his criminal history, the nature and details of the incarceration offense and the Petitioner's present reaction thereto, the Petitioner's disciplinary history during his incarceration, his achievements while incarcerated (including his completion of ASAT, ART, IPA, his work history, and his attainment of a paralegal degree). Furthermore, the Board of Parole also possessed for its review, *inter alia*, letters written on the Petitioner's behalf. from the Petitioner's, the Petitioner's Pre-Sentence Investigation Report, the COMPAS Reentry Risk Assessment, and the Petitioner's Inmate Status Report. Finally, the Board of Parole was aware of the length of the Petitioner's incarceration and that this was his first appearance before the Parole Board. *See*, Vaughn v. Evans, 98 A.D.3d 1158, 1159; Matter of Valerio v. New York State Div. of Parole, 59 A.D.3d 802, 803.

Inasmuch as the determination of the Board was made in accordance with the requirements of Executive Law § 259-i (2)(c) insofar as the consideration of statutory factors is concerned, and as the determination did not evidence"'irrationality bordering on impropriety'" (Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, *quoting*, Matter of Russo v. New York State Bd. Of Parole, 50 N.Y.2d 69, 77), the Plaintiff has failed to meet his burden of demonstrating that determination was anything other than a proper exercise of the Board's discretion (*see*, Matter of Tafari v. Evans, 102 A.D.3d 1053, 1053), such that further judicial review relative to the substance of that determination would be

inappropriate. *See*, Moore v. Travis, 8 A.D.3d 717, 718.

With regard to the other issues raised by the Petitioner in the course of his application: the Court finds that the written decision of the Board was sufficient to give the Petitioner notice as to the reason his application was denied. *See*, Little v. Travis, 15 A.D.3d 698, 699. In any event, it is well established that the Board need not articulate every factor that it considered in the course of rendering its determination. *See*, Dalton v. Evans, 84 A.D.3d 1664, 1664. Further, although the Petitioner presented the Board with a credible impressive institutional record as to, *inter alia*, conduct and achievement, it remains that the Board is not required to weight all factors equally. *See*, Martinez v. Adams, 108 A.D.3d 815, 816; Dalton v. Evans, *id.* In the instant case it appears that the Board gave greater weight to the crimes committed by the Petitioner. In view of the nature of those crimes, and in light of the evidence that the Board considered all the statutory factors as aforesaid, the Court is not prepared to find such emphasis irrational. *See*, Martinez v. Adams, *id*; Dalton v. Evans, *id.* The Court further finds that the Petitioner's claim that he should have been provided with a Transitional Accountability Plan is substantively undercut by the fact that the Petitioner was sentenced prior to the effective date of Correction Law § 71-a. *See*, Rivera v. New York State Div. of Parole, 2014 N.Y. Slip Op. 05225. In addition, notwithstanding the fact that the Petitioner presented a generally favorable COMPAS Reentry Risk Assessment, that fact does not mandate his release *per se*. *Cf*, Montane v. Evans, *id* at 202.

However, the Court does find merit in the Petitioner's contention that the Board of

Parole, in the course of considering the offenses that the Petitioner is incarcerated for committing, considered information that was incorrect. As amply demonstrated by the Petitioner in the course of his brief, the two Driving While Intoxicated offenses for which the Petitioner stands convicted, were erroneously presented to the Board of Parole as being "D" felonies, when they were each in fact "E" felonies. Moreover, while that Petitioner preserved the issue by bringing it to the Board of Parole's attention in the course of his interview and attempting to correct the record relative to same (*cf*, Morrison v. Evans, 81 A.D.3d 1073, 1073), the Board merely acknowledged his assertion and did not investigate the claim, correct the record, or agree to resolve the discrepancy in the Petitioner's favor for the limited purpose of considering his application. *See*, Grune v. Board of Parole, 41 A.D.3d 1014, 1015.[3] Instead, the Board of Parole continued to consider the two offenses as "D" felonies inasmuch as the Parole Board Release Decision Notice issued on March 22, 2013, listed both Driving While Intoxicated offenses as "D" rather than "E" felonies. Consequently, it is apparent that the Board of Parole erroneously relied on incorrect information in the course of reaching its decision. *See*, Henry v. Dennison, 40 A.D.3d 1175, 1175; Smith v. New York State Board of Parole, 34 A.D.3d 1156, 1157; Hughes v. New York State, 21 A.D.3d 1176, 1177; Plevy v. Travis, 17 A.D.3d 879, 880; Lewis v. Travis, 9 A.D.3d 800, 801. Moreover, in that a review of the Board of Parole's decision reveals

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[3] The Court notes that the Board of Parole did constructively agree to not to consider what Petitioner convincingly asserted were errors in his record as to arrests and convictions that preceded the incarceration offenses. As such, the Court has not included those errors in the "erroneous information" analysis presented *supra*. However, it remains that the spate of errors presented in the records relative to the Petitioner are relevant to counter any argument that the errors considered in the analysis are either *de minimus* or outliers.

that the primary factor it relied upon in making its determination was the Petitioner's incarceration offenses, it cannot be gainsaid that the inclusion of that erroneous information carried with it the clear potential to meaningly effect the Petitioner's chances of parole and the overall fairness of the hearing. *Cf*, Morrison v. Evans, *id*; Lewis v. Travis, *id.*

The Court has considered the remainder of the Petitioner's contentions and finds them, without exception, to be unavailing.

Based on the aforesaid, it is hereby **ORDERED** that this matter be remitted to the Board of Parole for a new hearing.

The foregoing is the Decision and Order of the Court

Dated: May 18, 2015.
Hudson, New York

~~ENTER:~~

Jonathan D. Nichols, A.J.S.C.