December 2019

Decision in Art. 78 proceeding - Rabenbauer, Philip (2013-11-27)

SUPREME COURT OF THE STATE OF NEW YORK

In the matter of the Application of
PHILIP HABENBAUER, 87 A 9916,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANTONUCCI, Acting Commissioner, NEW YORK STATE BOARD OF PAROLE, TINA STANFORD, Chairperson,

Repsondents.

DECISION and ORDER
Index No. 1855-13

APPEARANCES: David Lenefsky, Esq.
One Columbus Place
New York, NY 10019
Attorney for Petitioner

Attorney General of the State of New York
One Civic Center Plaza–Suite 401
Poughkeepsie, N.Y. 12601
By: Tracy Steeves, AAG, of counsel
Attorney for Respondents

LaBuda, J.

This matter comes before the Court on Petitioner's request for immediate release to parole, or in the alternative, a *de novo* parole hearing. Respondents have submitted and affirmation in opposition. The court heard oral argument on October 28, 2013.

At the outset, Respondents argued, and this Court agrees, that the Court is without authority to order Petitioner's immediate release. For the reasons stated below, however, the Petitioner is entitled to a *de novo* parole hearing.

Factual Background

In March, 1986, then 36-year-old Petitioner strangled his 25-year-old wife and buried her body at an out of state location. When questioned by the police approximately one week later, Petitioner made a full oral and written confession and disclosed the burial location to the police. He was arrested and charged with Murder in the Second Degree. He was tried by a bench trial before the Hon. Edward A Baker, Nassau County Court Judge,[1] in which his defense was "extreme emotional disturbance," due to his wife's alleged ongoing adulterous behavior. Both Petitioner's and the People's psychiatrists testified at trial that Petitioner acted under extreme emotional disturbance when he killed his wife. The trial court, however, found Petitioner guilty of Murder in the Second Degree, but after considering many factors, including numerous letters of support, sentenced Petitioner to 15 years to life in state prison, the minimum allowable sentence.

Petitioner appeared for his ninth parole hearing on December 11, 2012, at Woodbourne Correctional Facility, having served 27 years, 12 years beyond his minimum sentence. He is now 57 years old. The hearing took place before Commissioners Thompson and Ross. The board denied parole release and imposed a 24-month hold.

Petitioner argues (1) that the board's decision was arbitrary and capricious; (2) that the board considered only the instant offense in making its determination to deny parole release; and (3) the board's decision was conclusory and lacked detailed reasons for the denial decision.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

> In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (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....

The parole board must also consider whether "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 his crime as to undermine respect for the law." 9 NYCRR 8002.1.

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[1]Petitioner waived his right to a jury trial.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;
(b) the inmate's release plans;
(c) any statement made to the board by the victim's representative;
(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and
(e) the inmate's prior criminal record.

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison***, **41 A.D.3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any guidelines in its determination. ***Walker v. Travis***, **252 A.D.2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis***, **95 N.Y.2d 470 [2000]**; ***Russo v. New York State Bd. of Parole***, **50 N.Y.2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a)**; ***Wallman v. Travis***, **18 A.D.3d 304 [1st Dept. 2005]**; ***Malone v. Evans***, **83 A.D.3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole***, **50 NY2d 69 [1980]**; ***Epps v Travis***, **241 AD2d 738 [3rd Dept. 1997]**; ***Matter of Silmon v. Travis***, **95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans***, **81 AD3d 1059 [3rd Dept. 2011]**; ***Matter of Wise v. New York State Division of Parole***, **54 AD3d 463 [3rd Dept. 2008]**. Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. The changes to **Executive Law, §259-c(4)** became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-(c)(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Discussion

While a parole board enjoys a significant level of discretion, the discretion is not unlimited. There are three things a parole board cannot do. First, a parole board cannot base its decision to deny parole release solely on the serious nature of underlying crime. ***Rios v. New***

York State Div. of Parole, 15 Misc3d 1107(A) [Sup. Ct. Kings Co. 2007]; *see also*, *King v. New York State Division of Parole*, 190 AD2d 423 [1st Dept. 1993]. Second, while the board need not consider each guideline separately, and has broad discretion to consider the importance of each factor, the board *must still consider the guidelines*. Executive Law §259-i(2)(a); *Rios, supra*. Third, the reasons for denying parole must be given in detail and not conclusory terms. Executive Law §259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005].

After a thorough review of the record before this Court, including the confidential materials for *in camera* review, this Court has determined the board based its decision to deny parole release to Petitioner solely on the serious and violent nature of the instant offense, did not consider all of the guidelines or factors, and the decision was in conclusory terms.

There is no additional rational, other than the board's opinion of the heinous nature of the instant offense, to justify denial of parole release: Petitioner has had a close to perfect disciplinary record while incarcerated, has had and continues to have outside clearance without incident, has completed three college degrees while in prison, has completed every program offered by DOCCS as well as additional programs; his non-felony youthful offender history is unremarkable and there is nothing in the record to suggest Petitioner had any type of escalating history of violence leading up to the instant offense. Petitioner submitted numerous letters of recommendation for his release from corrections officers, officials, and members of the community. He has a substantial support system on the outside, release plans, and housing ready upon his release.

Petitioner has repeatedly expressed remorse, shame and guilt for murdering his wife and takes full responsibility for his actions. He cannot change what he did, yet the board in this matter spent approximately three quarters of the parole interview questioning Petitioner about the instant offense. Commissioner Thompson's comment at the end of the colloquy is "Horrible crime," strongly supporting Petitioner's argument that the decision to deny parole was based solely on the board's opinion of the serious and violent nature of the instant offense and nothing else.

> Certainly, every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the seriousness of the crime itself. *King, supra*, at 433.

The remainder of the hearing transcript (a mere three and a half pages) reveals that the board discussed other factors and Petitioner's achievements while in prison in a very perfunctory manner, and in fact never discussed the many letters of support from corrections staff. *See, Matter of Craxum v. New York State Board of Parole*, 14 Misc3d 661 [Sup. Ct. Bronx Co. 2006]. Less than one quarter of the time the board spent with Petitioner consisted of any discussion or inquiry regarding his numerous achievements while in prison, his plans for release,

his skills, his very positive scores on the COMPAS Risk Assessment, or any of the other positive factors weighing heavily in favor of parole release.

After spending almost the entire hearing questioning Petitioner about the instant offense and then making the obligatory, but superficial inquiry into other factors, the board somehow concluded his release would be incompatible with the welfare and safety of the community and that his release would "deprecate the severity of the offence as to undermine respect for the law," without any further detail. Petitioner asks how that is so; Respondents provided no specific explanation in their answering papers or during oral argument.

This Court, therefore, is left with no ability to evaluate why the board made this conclusory and vague statement in its decision. Looking at the record as a whole, the Court concludes that not only does the record fail to clarify on what specific grounds the board denied parole, but the record strongly supports parole release for this inmate who has served nearly double the time of his minimum sentence. The board's decision and Respondents' counsel's oral argument fail to specify why the board concluded Petitioner's release would be incompatible with the safety and welfare of society or why his release would deprecate the serious nature of the crime so as to undermine respect for the law. *Rios, supra.*

> ....While making a passing reference to [Petitioner's] 'clean disciplinary record and positive programmatic efforts,' the Parole Board made clear that those factors no matter how impressive, could not justify his release form prison when weighed against the seriousness of the crime. Thus, the passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the parole board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime (*see Matter of Phillips v. Dennison, NYLJ,* Oct. 12, 2006, at 23, col1; *quoting Matter of King,* 190 AD2d at 434." *Rios, supra.*

The board in this matter has failed to articulate any reasoning for its decision to deny parole release to Petitioner, and therefore this Court holds the decision was arbitrary and capricious. It is unacceptable, under the law, for Respondents to have simply restated the usual and predictable language contained in so many parole release denial decisions, with no specificity or other explanation to justify parole denial. While this Court recognizes the substantial discretion afforded to parole boards by statutory authority, that authority and parole board decision are reviewable by courts and must stand up to the other statutory requirements regarding parole release procedures. In the instant matter, the Court finds that the board has failed to meet those standards by rendering a conclusory decision, clearly based solely on the instant offense, and completely unsupported by the record and petitioner's history of incarceration.

Based on the foregoing, it is therefore

ORDERED, that the Petition is granted to the extent that the Parole Board shall afford the petitioner herein a *de novo* Parole hearing within thirty (30) days of the date of entry of this order, and a decision thereon not more than fifteen (15) days thereafter; and it is further

ORDERED, that the *de novo* hearing herein shall consist of at least two Parole Board members, none of whom sat on the prior parole hearing involving the above captioned inmate.

This shall constitute the Decision and Order of this Court.

DATED: November 27, 2013
Monticello, New York

Hon. Frank J. LaBuda
Acting Justice Supreme Court

Papers considered:
Notice of Petitioner, by David Lenefsky, Esq., dated July 29, 2013
Verified Petition with Exhibits, by David Lenefsky, dated July 29, 2013
Book of Petitioner's Achievements, Letters of Support, and other submissions to Parole Board
Answer and Return with Exhibits, by Tracy Steeves, AAG, dated October 8, 2013
Documents from Respondents for *in camera* inspection