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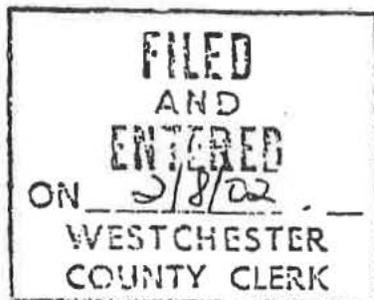
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. FRANCIS A. NICOLAI



IN THE MATTER OF THE APPLICATION OF

LORETTA CLEMENT

Index No. 013156/01

Petitioner,

-against-

DECISION, ORDER
AND JUDGMENT

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

Respondent.

The following papers numbered 1 to 12 were read on this application pursuant to CPLR

Article 78:

Order to Show Cause, Petition and Affirmation:	1 - 3
Administrative Appeal - Brief of Appellant:	4
Administrative Appeal - Appendix:	5
Verified Answer and Exhibits (Said Exhibits constituting the Certified Record) :	6 - 12

Upon the foregoing papers filed herein, it is ORDERED that this Article 78 Proceeding is disposed of as follows: Petition is Granted to the extent that the decision of the New York

State Board of Parole (hereinafter referred to as the "Board") dated September 13, 2000 is vacated. The Board is directed to immediately schedule and conduct a de-novo hearing and provide a decision in accordance with this Court's determination herein.

Petitioner, brought the instant Article 78 proceeding to review the decision of the Board dated December 13, 2000. Said decision denied the Petitioner release on parole and ordered her held for an additional two year period before being eligible for rehearing. This had been the third time that the Petitioner appeared before the Board and been denied parole. Petitioner contends, inter alia, that: "... the Board of Parole acted unlawfully in failing to consider the various factors statutorily mandated pursuant to the rules and regulations of the New York State Executive Law ..., such decision denying parole release also being predetermined and constituting 'irrationality bordering on impropriety' ...". For its part, the Board contends that the record shows it did consider all of the statutory criteria even though the Board did not specifically enumerate each criteria in its decision, that the decision to release on parole or not is strictly within the Board's discretion and that this matter should be transferred to the Appellate Division because the Petitioner's arguments amount to a contention that the decision is not supported on substantial evidence in the record before the Parole Board. The Petitioner has been in prison since November of 1977 based upon her conviction on murder and manslaughter charges stemming from the deaths of three of the Petitioner's children as a result of a fire the Petitioner started in her home.

At the outset, it must be noted that the Petitioner's argument does not rely upon a "substantial evidence" question. Instead, the Petitioner asserts that the Board has acted

arbitrarily and capriciously by failing to follow the lawfully mandated procedures which require it to specifically consider certain criteria in parole review hearings. Accordingly, there is no need to transfer this matter to the Appellate Division.

Turning to the merits of the case, while it is true that the Courts will accord the Parole Board's determination a great deal of deference, the determination remains subject to review pursuant to Article 78 of the CPLR. In the event that the determination is in violation of law or arbitrary and capricious to the point of being irrational bordering on impropriety, the Court may intervene. In the plethora of published cases on the subject (mostly from the Appellate Division of the Third Department), the Courts have held that, so long as the record demonstrates that the Board has considered the statutory criteria, the determination will be upheld and the Court will not engage in attempting to second guess whether the board has appropriately weighed the various criteria. However, those cases contain almost boilerplate wording to the effect that the record before the Parole Board "belies" a contention by a Petitioner that the only criteria considered was the severity of the petitioner's crime. These situations are at variance with the case presently before this Court.

In the instant case, the transcript of the parole hearing consists of 17 pages including a cover page, the stenographer's certification and the Board's decision. Of the remaining fourteen pages, over eleven pages are devoted to interchanges between the two Board members and the Petitioner which essentially reiterate and discuss the particulars of the Petitioner's crime and discrepancies between the facts as presented at the Petitioner's trial and the same events as imparted by the Petitioner. This is despite the fact that the Petitioner's crimes occurred over

twenty five years ago and the fact that the crimes relate to an emotionally charged situation which resulted in the Petitioner being responsible for the deaths of her three children.

Additionally, the Board members make references to the transcripts of the prior parole hearings as well as "the record". Nevertheless, the items referred to are not contained within the record as certified to the Court in the instant proceeding.

Furthermore, virtually no effort was made by the Board members to elicit any information from the Petitioner with respect to her accomplishments and the productive use she has made of the time she has spent in prison. In fact, were it not for the Appendix presented by the Petitioner's counsel as part of her administrative appeal, the Court would have no knowledge of the Petitioner's numerous commendations, degrees and accomplishments while in prison. As a result, the Court is certainly not in a position to determine whether they were considered by the Board in its decision making process.

Moreover, there is no indication by the Board as to what changes it expects to find the next time the Petitioner comes before it for review. The egregiousness of the Petitioner's crimes cannot be changed by the Petitioner's continued imprisonment. If the seriousness of those crimes had been intended as the sole criteria by which release was to be measured, there would have been no reason for the Petitioner's original sentence to be anything but "Life in Prison". Clearly the sentencing court and the laws of our State did not contemplate this scenario. Conversely, if there are some means for the Petitioner to improve her ability to be measured by the statutory

criteria on the next occasion of her appearance before the Board, the decision should advise her of what is expected and, thus, offer her the opportunity to undertake them.

Finally, considering the fact that the Board is the acknowledged expert on whether or not it is appropriate to release any given inmate to parole, there is no reason for its decisions to fail to enunciate the factors it has considered and relied upon in any given parole decision.

Based upon all of the foregoing and the condition of the record as presented to the Court in the instant matter, it is impossible for the Court to determine whether or not the Board has considered the necessary, statutory criteria based upon whatever evidence may have been before the Board in connection with the Petitioner's case. Accordingly, the Court is unable to determine whether the Board has acted arbitrarily and capriciously and the matter must be remanded so that an appropriate record (including the necessary information for a detached observer to determine whether or not the statutory criteria have been considered and applied) may be made. Without such a record, Article 78 review of the Board's decisions becomes meaningless.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
February 7, 2002



MON. FRANCIS A. NICOLAI
Justice of the Supreme Court