December 2019

Decision in Art. 78 proceeding - Comfort, Joseph (2017-10-27)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
JOSEPH COMFORT, #82-C-0273,

Petitioner,

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

DECISION AND ORDER
INDEX NO. 3299-17

-against-

NEW YORK STATE BOARD OF PAROLE,
TINA STANFORD, CHAIRWOMAN

Respondent.

APPEARANCES:

NEW YORK STATE DEFENDERS ASSOCIATION
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KOWEEK, J.:

Petitioner commenced the instant CPLR Article 78 proceeding challenging respondent's determination which denied his application for parole release and held him for an additional 24 month period.

Petitioner is in the custody of the New York State Department of Corrections and Community Services (DOCCS) serving an indeterminate term of imprisonment. The petitioner

was convicted of the crimes of Murder in the Second Degree, Attempted Murder in the Second Degree, Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a Controlled Substance in the First Degree. The convictions resulted in an incident where the petitioner and his brother engaged in a shootout with two undercover New York State police officers during an undercover cocaine investigation. Petitioner fired a weapon at the officers, killing one and seriously injuring the other. On April 20, 1982, the petitioner was sentenced to an indeterminate term of 33⅓ years to life.

The petitioner appeared before the Parole Board for his second parole hearing on October 11, 2016. After the interview, the Board issued its decision denying petitioner's release and ordered petitioner held for 24 months. The Panel concluded:

> The Panel notes your personal growth and productive use of time, however, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. After carefully reviewing your record and conducting a De Novo interview, parole is denied.
>
> You stand convicted of the serious offense of murder second, attempted murder second, criminal possession of a controlled substance first and criminal sale of a controlled substance first, in connection with your actions during a shootout, killing a[n] undercover officer and seriously wounding another undercover officer, that is a continuation of your criminal history, which includes Family Court history.
>
> The Panel makes note of your program goals and accomplishments, including your completion of Aggression Replacement Therapy and vocational work, risk and needs assessment and your overall good disciplinary record. Also, your release plans, letters of support, significant official and community opposition, and sentencing minutes have been reviewed and considered. Despite your low risk scores on Criminal Offender Management Profile for Alternatives for Sanctions Risk Assessment, you demonstrated shallow remorse to the Panel and focused on your desire to be released.
>
> After deliberating, reviewing your overall record, and statutory factors, discretionary release is not presently warranted, as your release would trivialize

> the tragic loss of life that you caused and, furthermore, would be incompatible with the welfare of society and would so deprecate the serious nature of your crimes as to undermine respect for the law.

Petitioner filed a Notice of Appeal with the Division of Parole Appeals Unit on February 16, 2017. On March 22, 2017, the appeal was denied by the respondent. Petitioner now brings this CPLR Article 78 proceeding.

Initially, the petitioner alleges the Board failed to comply with Executive Law § 259-c(4) which requires the Board to use procedures to measure an inmate's rehabilitation and the likelihood of success upon release. The petitioner maintains his parole denial should be vacated.

In 2011, Executive Law § 259-c(4) was amended to require the Board to "establish written procedures for its use in making parole decisions" and to consider the person's likelihood of success upon release to parole supervision. Executive Law § 259-i(2)(c) was amended to consolidate into one section the complete list of factors the Board is required to consider in evaluating applications for parole release. The amendments to Executive Law § 259-i(2)(c) became effective in administrative hearings conducted on or after October 1, 2011.

Petitioner's parole release interview was subject to the requirements of Executive Law § 259-c(4). The petitioner alleges the decision of the Board was irrational and did not consider all of the requirements of Executive Law § 259-i(2)(c). (Matter of Thwaites v. New York State Board of Parole, 34 Misc3d 694 [Sup. Ct. 2011]).

A review of the record indicates the Board considered the requirements of the Executive Law relating to parole release. The amendments to Executive Law 259-i(2)(c) did not result in a substantiative change in the criteria which the Parole Board should consider in rendering its decisions. (Montane v. Evans, 116 AD3d 197 [3d Dept. 2014]).). This Court finds the factors that

must be considered for release on parole were adequately considered here. The record does not demonstrate that the Parole Board failed to consider the statutory factors set forth in Executive Law § 259-i(2)(c). (Goldberg v. New York State Board of Parole, 103 AD3d 634 [2d Dept. 2013)].

Parole release decisions are discretionary and, if made pursuant to statutory requirements, will not be disturbed. (Matter of Neal v. Stanford, 131 AD3d 1320 [3d Dept. 2015]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review. (Matter of Hamilton v. New York State Division of Parole, 119 AD3d 1268 [3d Dept. 2014]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention. (Matter of Silmon v. Travis, 95 NY2d 470 [2000]; Matter of Russo v. New York State Board of Parole, 50 NY2d 69 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board. (Matter of Delacruz v. Annucci, 122 AD3d 1413 [4th Dept. 2014]). With these principles in mind, the Court turns to the merits of petitioner's case.

Petitioner argues the decision to deny him parole was irrational, arbitrary and capricious, and resulted in a gross abuse of discretion. A Board's determination denying parole release will not be disturbed unless there is a "showing of irrationality bordering on impropriety" (Matter of Silmon v. Travis, 95 NY2d at 476). The Court finds the Parole Board considered the relevant factors in making its decision and its determination was supported by the record. The decision was sufficient to apprise petitioner of the reasons for the denial of discretionary release. A review of the transcript of the parole interview reveals that, in addition to the instant offenses,

attention was paid to such factors as petitioner's institutional programming and his plans upon release. He was given an opportunity to make a statement in support of his release. The Board also had petitioner's sentencing minutes, Inmate Status Report, Pre-Sentence Investigation Report, a COMPAS Reentry Risk Assessment and a COMPAS Case Plan which details petitioner's institutional adjustment, programming, disciplinary record, proposed release plans, criminal history, risk factors and the facts of the current offense. Petitioner claims his COMPAS risks levels were low. Contrary to petitioner's claim, the COMPAS assessment is but one of many documents the Board now considers when making its parole release decisions. (Matter of Thomas v. Evans, 109 AD3d 1069 [3d Dept. 2013]). While the Board must consider the conclusion reached through use of the COMPAS assessment, it may draw a different conclusion regarding the risks posed by the petitioner's release. (Matter of Rivera v. New York State Division of Parole, 119 AD3d 1107 [3d Dept. 2014]).

The Court notes the Board was free to place emphasis on the seriousness of petitioner's instant offenses. (Matter of Montalvo v. New York State Board of Parole, 50 AD3d 1438 [3d Dept. 2008]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one. (Matter of Vigliotti v. State of New York Executive Division of Parole, 98 AD3d 789 [3d Dept. 2012]; (Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3d Dept. 2008]). The determination is not rendered improper by the Parole Board's failure to "expressly discuss each of these guidelines in its determination" (Matter of King v. New York State Division of Parole, 83 NY2d 788 [1994]).

Executive Law § 259-i(2) does not grant parole release merely as a reward for

petitioner's good conduct or achievements while incarcerated. (Matter of Mentor v. New York State Division of Parole, 87 AD3d 1245 [3d Dept. 2011]). The Court finds it was not irrational for the Board to place more weight on instant offenses than petitioner's institutional accomplishments and plans for release. (Matter of Hamilton v. New York State Division of Parole, 119 AD3d at 1273-1274). Petitioner has failed to meet his burden showing the Board did not consider the relevant statutory factors or that the decision was irrational, arbitrary, capricious or contrary to law.

Petitioner's conclusionary allegation that the Board's decision was predisposed to denying him release is without merit. (Matter of Connelly v. New York State Division of Parole, 286 AD2d 792 [3d Dept. 2001], appeal dismissed 97 NY2d 677 [2001]). In addition, petitioner's allegations of bias on the part of the Board are not supported by the record and petitioner failed to offer proof that the outcome of this case flowed from the alleged bias. (Matter of Hernandez v. McSherry, 271 AD2d 777 [3d Dept. 2000], lv denied 95 NY2d 769 [2001]). The Parole Board is required to consider the same factors each time the petitioner appears for a parole release hearing. (Matter of Williams v. New York State Division of Parole, 70 AD3d 1106 [3d Dept. 2010[, lv denied 17 NY3d 709 [2010]). The record discloses the Board rendered its determination after considering the full record, including the hearing testimony, the petitioner's institutional background, his achievements, his criminal history and release plans. (Matter of Marziak v. Alexander, 62 AD3d 1227 [3d Dept. 2009]; Matter of Salahuddin v. Dennison, 34 AD3d 1082 [3rd Dept. 2006]).

Petitioner's claim that he was denied due process has been examined and found to be without merit. Executive Law § 259-i, does not create an entitlement to release on parole and

therefore does not create interests entitled to due process. (Paunetto v. Hammock, 516 F. Supp 1367 [US Dist. Ct., SDNY, 1981]). There is no due process right to parole. (Russo v. New York State Board of Parole, 50 NY2d at 73). Also, there is no due process right for an inmate to obtain a statement as to what he should do to improve his chances for parole in the future. (Matter of Francis v. New York State Division of Parole, 89 AD3d 1312 [3d Dept. 2005]). Nor does the denial of parole constitute double jeopardy. (Matter of Patterson v. Goord, 1 AD3d 845 [3d Dept. 2003]). Petitioner's allegation that the denial of parole was akin to re-sentencing is without merit. (Matter of Murray v. Evans, 83 AD3d 1320 [3d Dept. 2011]). Moreover, where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but is examined using a rational basis standard to determine if the action violated the equal protection clause. (Massachusetts Board of Retirement v. Murgia, 427 US 307 [1976]; Maresca v. Cuomo, 64 NY2d 242 [1984]).

Petitioner maintains the Board should not have considered community opposition to his parole release. Petitioner claims the New York State Troopers Benevolent Association solicited the public to submit letters in opposition to petitioner's parole release. The petitioner claims the Benevolent Association sought help from the public "to ensure Comfort is denied parole and kept in prison, where he belongs." Petitioner contends Executive Law 259-i does not allow the Board to consider opposition statements from the public. Petitioner claims the statements from the public may contain erroneous information that should not have been considered by the Board.

The petitioner has not alleged or demonstrated that the Board considered any erroneous letters or emails from the public that influenced their decision in denying parole release. Petitioner's allegation that the Board may have considered erroneous information supplied by

public opposition is merely speculative. It would not be unusual for the Trooper Benevolent Association to oppose parole release of those inmates who have been convicted of the murder of a trooper or police officer. The Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A) (victims/families), in opposing an inmate's release to parole supervision. (Matter of Grigger, 11 AD3d 850 [3d Dept. 2004], lv denied 4 NY3d 704 [2015]). 9 NYCRR § 8000.5(c)(2) provides in part that "it is essential . . . to permit private citizens to express freely their opinions for or against an individual's parole". The allegation that the Board considered erroneous information provided by community opposition is unfounded. The petitioner was denied parole release for reasons other than community opposition. (Matter of Ebbs v. Regan, 54 AD2d 611 [4th Dept. 1976], appeal denied 40 NY2d 897 [1976]). The Parole Board denied parole release pursuant to Executive Law § 259-i based upon the many factors discussed herein.

Petitioner's allegation that the Board has adopted a more punitive approach towards convicted violent offenders is also unfounded. Courts have consistently rejected unsupported allegations that the Board merely effectuates an informal executive policy when it denied parole release to violent offenders. (Matter of MacKenzie v. Dennison, 55 AD3d 1092 [3d Dept. 2008]). Moreover, a review of the record reveals that petitioner's speculative and conclusionary assertion that the denial of parole was influenced by political or media pressures is unpersuasive. (Matter of Allah v. Pataki, 15 AD3d 810 [3d Dept. 2005], appeal dismissed 5 NY3d 780 [2005]).

The record discloses the Board rendered its determination after considering the full record, including the hearing testimony, the petitioner's institutional background, his achievements, his criminal history and his release plans. (Matter of Marziak v. Alexander, 62

AD3d 1227 [3d Dept. 2009]). Petitioner's allegation that the denial of parole was akin to re-sentencing is without merit. (Matter of Murray v. Evans, 83 AD3d 1320 [3d Dept. 2011]). In addition, the Board's decision to hold the petitioner for the maximum 24 months is within the Board's discretion and was supported by the record. (see, Executive Law § 259-i(2)(a); Matter of Campbell v. Evans, 106 AD3d 1363 [3d Dept. 2013]).

The Court finds the decision of the Parole Board was in accordance with the statutory requirements and was not excessive, irrational, arbitrary, capricious or in violation of lawful procedure. (Matter of Russo v. New York State Board of Parole, 50 NY2d at 77).

The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination. (Hubbard v County of Madison, 71 AD3d 1313 [3d Dept. 2010]).

Accordingly, the petition is hereby denied.

The original Decision, Order and Judgment is being returned to the attorneys for respondent. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. All original supporting documentation is being sent to the Albany County Clerk's Office. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

This is the Decision and Order of this Court.

DATED: October 27, 2017
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated May 22, 2017; Verified Petition dated May 15, 2017 with annexed exhibits A-O; Memorandum of Law undated;

2. Verified Answer dated July 21, 2017 with annexed exhibits A-L; Memorandum of Law dated July 24, 2017.

3. Reply correspondence of Alfred O'Connor, Esq. dated August 10, 2017 with annexed exhibits.