December 2019

Decision in Art. 78 proceeding - Ramirez, Santiago (2017-02-07)

DMG

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

SANTIAGO RAMIREZ,

Petitioner,

DECISION, ORDER & JUDGMENT

-against-

Index No: 1928/2016

TINA STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,

Defendants.

The following papers were read and considered on this Article 78 petition:

ORDER TO SHOW CAUSE
PETITION
EXHIBIT A

ANSWER AND RETURN
EXHIBITS 1-11

Petitioner brought this proceeding pursuant CPLR Article 78 to review a determination of the board of parole denying his request for parole release. In 1982 petitioner was convicted after trial of murder in the second degree and assault on the first degree. That same year he was sentenced to an aggregate indeterminate term of 22 years to life. He has appeared before the parole board a total of 11 times since his conviction, with one appearance being a court ordered *de novo* interview and two appearances that were re-calendared due to a lack of consensus among the voting board members. Petitioner is now 55 years old. In May 2016 he again appeared before the parole board, having been incarcerated 35 years. Following an interview, the board denied release and ordered him held for 24 months. This proceeding followed.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole. See Matter of Miller v. NYS Div. of Parole, 72 AD3d 690 (2nd Dept. 2010). 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. A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered. See Matter of Huntley v. Evans, 77 AD3d 945 (2nd Dept. 2010). It is further permitted to place a greater emphasis on the gravity of offense committed. See Matter of Serrano v. Alexander, 70 AD3d 1099, 1100 (3rd Dept. 2010). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense. Huntley v. Evans, 77 AD3d at 947; King v. New York State Div. of Parole, 190 A.D.2d 423 (1st Dept. 1993). Moreover, 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). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and "[s]uch reasons shall be given in detail and not in conclusory terms." Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2nd Dept. 2011). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent "a showing of irrationality bordering on impropriety." Matter of Russo v. NYS Bd. of Parole, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate's rehabilitation and likelihood of success upon release. See Ramirez v. Evans, 118 AD3d 707 (2nd Dept. 2014). In response, the board of parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool. A COMPAS assessment was prepared in connection with petitioner's May 2016 appearance before the parole board.

At petitioner's parole hearing, the board questioned him about his crimes of conviction, length of incarceration, acceptance of responsibility and remorse for his offenses, institutional achievements and prospects for employment and housing upon release. Petitioner responded to questions of his crimes of conviction and his COMPAS assessment. The board acknowledged that the assessment had him at a low risk across the board for felony violence, arrest or absconding. The board further acknowledged he had an asbestos license, completed ASAT(Alcohol and Substance Abuse Treatment), ART (Aggression Replacement Therapy) and was continuing with group sessions with narcotics anonymous. The board also recognized that if released he could reside with his father and had employment prospects based upon his vocational training. The board acknowledged receipt of documents petitioner submitted outlining his institutional achievements and letters, including some from individuals employed with the New York State Department of Correctional and Community Supervision, recommending petitioner for parole release. Toward the end of the short hearing, the board stated that there was official and community opposition to his release on file.

Following the hearing, the board issued a written decision stating that discretionary release was not warranted due to concern for the public, self safety and welfare. The decision noted petitioner's crimes of conviction, recognized that these were his only criminal convictions, and noting his institutional programming achievements and clean disciplinary records since his prior appearance. The decision further noted official opposition and "consistent community opposition" to petitioner's release. Stating that it had considered the required statutory factors, the board denied release finding that it would 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."

The board's decision was affected by an error of law as it considered at least one factor not authorized under Executive Law §259-i. The commissioners stated both during the hearing and in their written decision that there was consistent community opposition to petitioner's release. Executive Law §259-i does not permit the board to consider its penal philosophy in deciding whether parole release is warranted. To the extent that the board's determination here is based upon letters of community opposition, such letters object to release based upon penal philosophy. As members of the parole board are not permitted to apply their own penal philosophy in determining whether release is appropriate, it necessarily follows that they may not deny parole release based upon letters from third parties expressing their penal philosophies. Notably, none of the letters nor descriptions of their content is in the record before the court. Hence, there is no explanation as to the "official" opposition to release. To the extent that it exceeds recommendations of the sentencing court the district attorney, the attorney for the petitioner or the statement of a crime victim as authorized in Executive Law §259-i, it too would not be properly considered. As the board improperly injected penal philosophy in rendering the challenged determination, (see King v NYS Division of Parole, 83 NY2d 788 [1994]), it is hereby

ORDERED that the petition is granted as it was affected by an error of law. It is further

ORDERED that this proceeding is remanded for a *de novo* hearing on petitioner's application for parole release. Such hearing shall occur within 45 days of the date of this decision and order. It is further

ORDERED that none of the hearing officers who participated in the May 17, 2016 parole board interview shall participate in the de novo hearing.

This constitutes the decision, order and judgment of this court.

Dated: February 7, 2017
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Santiago Ramirez DIN# 82A2130
Otisville Correctional Facility
PO Box 8
Otisville, NY 10963

State of New York
Office of the Attorney General
One Civic Center Plaza, Suite 401
Poughkeepsie, NY 12601-3157
ATTN: J. Gardner Ryan, Assistant Attorney General

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.