December 2019

Decision in Art. 78 proceeding - Rodriguez, Alejo (2016-02-25)

To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of

ALEJO RODRIGUEZ,

Petitioner,

DECISION AND ORDER

For a Judgment Pursuant to CPLR Article 78

INDEX NO.: 8670/2015
Returnable: 01/14/2016

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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SCIORTINO, J.

The following papers numbered 1 to 32 were considered in connection with the application of petitioner, by Order to Show Cause, for an Order and Judgment pursuant to Civil Practice Law & Rules Article 78:

PAPERS	NUMBERED
Order to Show Cause/Affidavit/Verified Petition	1 - 3
Exhibits 1-3/Exhibits A-P	4 - 22
Answer and Return/Exhibits 1-12	23 - 35
Verified Reply/Exhibits A-C	36 - 39
Addendum to Verified Reply/Exhibit A	40 - 41

Petitioner Alejo Rodriguez (Petitioner) seeks an order and judgment pursuant to Civil Practice Law & Rules Article 78, for the following relief: (A) annulment of the Parole Board's April 22, 2015 Decision denying him parole; (B) ordering of a *de novo* hearing within 30 days, in front of a new panel; and (C) ordering the Parole Board to adhere strictly to the requirements of Executive

Law § 259-i(2)(a).

Background and Procedural History

Petitioner is serving an indeterminate sentence of 18 years to life, after pleading guilty to second degree murder, and numerous other charges, in connection with the 1985 robbery of a jewelry store during which petitioner shot three store employees, killing two of them. Petitioner then fled to Miami Beach, Florida, where he was apprehended several weeks later. At the time of the murders, petitioner was 23 years old. He had no prior felony convictions; and he has now been in prison for thirty years.

Petitioner first appeared before the Parole Board in 2003, and has made six subsequent appearances. Each time parole was denied. On April 22, 2015, he sat for his seventh parole hearing. Prior to his hearing, on or about March 25, 2015, petitioner was evaluated by the COMPAS Reentry Assessment system, receiving favorable ratings, showing low risk for violence, re-arrest, absconding, and criminal involvement, and a Recommended Supervision Status 4.

During the April 22, 2015 hearing, petitioner was questioned about the circumstances of his 1985 offense. (Exhibit 1 to Petition). Petitioner acknowledged that he shot the store employees, who had laid on the floor as asked, out of fear that he was "losing control" of the situation. He also acknowledged that, prior to the instant offense and his resultant incarceration, he "was always destructive." *Id.* at 6.

The Board noted petitioner's efforts at rehabilitation, including aggression replacement training (ART) and work in the law library and as a recreation aide. Petitioner also brought to the Board's attention his academic accomplishments, including a Master's Degree from the New York Theological Seminary and petitioner's acceptance into the Union Theological Seminary upon his

release from prison. *Id.* at 5.

The Board questioned petitioner about his plans, if he were released. Petitioner advised that he planned to reside with a friend, and had secured several employment offers. *Id.* at 7-8. Petitioner acknowledged responsibility for his actions and expressed remorse for the crimes he committed, which he characterized as cowardly. *Id.* at 3. Petitioner also acknowledged feeling that he does not deserve to be embraced as he has been by members of the community. *Id.* at 5-6.

The Board advised Petitioner that, although his COMPAS results scored him as a low overall risk, it scored him high for history of violence.[1] The Board concluded by stating to petitioner, "We have a lot to think about here. Very violent crime. Two people are dead. You did do a lot of positive things." *Id.* at 8.

At the conclusion of the hearing, the Board denied parole, and held petitioner for an additional 24 months. The transcript of that Decision reads, in its entirety:

> Alejo Rodriguez, denied. Hold twenty-four months. Next appearance, 4/17.
> After review of the record and interview, the panel has determined, that if released at this time, your release would be incompatible with the welfare of society, and would so deprecate the serious nature of the crime as to undermine respect for the law.
> The Board 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 needs for successful re-entry into the community.
> Your release plans have also been considered.
> More compelling, however, is the callous disregard you had for the two victims that you killed, after shooting them at close range.

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[1]The Court notes that, in resolving a grievance filed by petitioner, in which petitioner alleged that this history of violence score was based on inaccurate information, the Department of Corrections and Community Services' Central Office Review Committee has ordered that petitioner's history of violence score be changed from eight to four. *See* Exhibit A to Addendum to Verified Reply.

The extreme violence exhibited in the Instant Offenses is of concern to the Board of Parole.

The Board notes your work in the law library, completion of ART, IPA training, educational accomplishments, letters of support, Parole packet and employment opportunities.

All Factors considered, your release, at this time, is not appropriate.

Id. at 9-10.

Petitioner thereafter timely filed an administrative notice of appeal and filed his brief, perfecting the appeal on June 4, 2015. Petition at ¶18. On October 2, 2015, the Appeals Unit affirmed the April 22, 2015 decision of the Board. (Exhibit F to Petition).

This matter was commenced by Order to Show Cause on or about December 10, 2015.

Petition and Answer

The Petition and supporting papers allege that the Parole Board's April 22, 2015 decision is arbitrary and capricious and contrary to the law. Petition at ¶ 20. Specifically, petitioner asserts that the Board improperly relied on the nature of petitioner's crime, failed to consider statutory factors, and issued a decision that is in violation of the standards set forth in Executive Law § 259-i(2)(a) and (c). *Id.*

Petitioner asserts that the Board failed to fairly and genuinely consider all of the factors required by Executive Law §259-i(2)(c)(A) and focused solely on only one, the seriousness of the crime. In so doing, he alleges that the Board ignored his "evident rehabilitative accomplishments, extraordinary release plans, and a strong outpouring of community support." *Id.* at ¶ 29. Petitioner further alleges that the Board's decision was affected by inaccurate information contained in his COMPAS report, which mischaracterized several prior arrests as violent, when in fact none were defined as violent under the applicable laws. *Id.* at ¶¶ 35-36.

Petitioner further alleges that the Board's decision fails to meet the standards of Executive

Law § 259-c(4) and 259-i, and 9 NYCRR § 8002.3(a), in that the Board failed to consider petitioner's most recent Case Plan, a factor the Board is required to consider. *Id.* at ¶ 42. While the Board is not required to articulate each factor considered, it is required to consider all relevant statutory factors. *Id.* at ¶ 43. Though the Board noted petitioner's COMPAS report, it made no mention of his Case Plan, which is "a relevant factor in the measurement of his rehabilitation." *Id.* at ¶ 54. The absence of any mention of petitioner's Case Plan during his hearing "reasonably questions whether his Case Plan was considered at all." *Id.* at ¶ 60. Such consideration is mandated by 9 NYCRR § 8002.3(a)(12). *Id.*

In addition, petitioner contends that the Board's decision violates Executive Law § 259-i(2)(a), which requires that the reasons for the denial of parole must be stated in detail. *Id.* at ¶61-62. He asserts that the decision was wholly conclusory and fails to detail its reasoning, as required by the Executive Law. *Id.* Petitioner further contends that the Board's decision fails to establish "any reasonable probability that [petitioner's] release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law" and thus is in violation of Executive Law § 259-i(2)(c). *Id.* at ¶ 61.

Petitioner asserts that the Board's conclusion that his release would be incompatible with the welfare of society is contradicted by "an extraordinary (sic) strong showing of community support," and that the Board's failure to offer any explanation for this contradiction "does not sufficiently allow for intelligent review," which is the very purpose of the requirement of a detailed written explanation. *Id.* at ¶ 70.

In its Answer and Return, respondent argues that petitioner's claims are without merit. Answer and Return at ¶ 4. "[U]nless petitioner is able to demonstrate convincing evidence to the

contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders on impropriety." *Id.* at ¶ 5. The respondent contends that, while the Board is required to consider certain factors in making its decision, it "does not have to expressly discuss each of these factors in its decision to deny parole release." *Id.* at ¶ 6. The Board may afford more weight to the nature of petitioner's crime and his criminal history than to other factors, and, "[i]n this regard, the denial of release to community supervision primarily because of the gravity of an inmate's crime is appropriate." *Id.* at ¶ 7.

The Board is not required to list each factor it considered, and its emphasis on a particular factor is not improper so long as the Board complies with statutory requirements. *Id.* at ¶ 9. An inmate's achievements while incarcerated do not "automatically entitle him to release to community supervision." *Id.* at ¶ 10. Release is not to be granted "merely as a reward for petitioner's good conduct or achievements while incarcerated." *Id.* "The Board's decision was sufficiently detailed to apprise petitioner of the reasons for his denial of release to community supervision, and no further detail was necessary." *Id.* at ¶ 11. "Petitioner has not demonstrated that any abuse or infirm decision-making on the part of the Board has occurred," and a *de novo* hearing thus is not warranted. *Id.* at ¶ 12.

Respondent further contends that petitioner has waived his opportunity to object to the Board's reliance on allegedly inaccurate information in his COMPAS report by failing to raise such an issue when given the opportunity to do so during his interview. *Id.* at ¶ 13. Furthermore, even assuming that petitioner's argument has not been waived, "the information contained in the COMPAS instrument is but one of many factors the Board considers" and "the quantified results

contained in the COMPAS instrument are not alone determinative factors in the decision-making process." *Id.* at ¶ 14.

Finally, respondent contends that petitioner's argument that the decision should be vacated because the Board did not consider his Case Plan is unavailing. *Id.* at ¶ 15. The requirement of the use of a Case Plan comes from DOCCS Directive 8500, "which calls for the use of a Case Plan... to fulfill the requirement of a Transitional Accountability Plan (TAP), which is required by Correction Law §71-a." Because this section of the Correction Law, which became effective September 30, 2011, was not given retroactive effect, respondent asserts that the Board is not required to consider a Case Plan for petitioner, who entered the custody of DOCCS prior to the effective date of the requirement. The Board is required, under 9 NYCRR § 8002.3(a)(12), to consider a Case Plan only if it has been prepared pursuant to Correction Law § 71-a. *Id.* at ¶ 15.

Respondent thus contends that petitioner cannot meet his burden of demonstrating convincing evidence that the Board did not act properly in accordance with statutory requirements. Because there has been no showing that the Board's decision evidences irrationality to the extent that it borders on impropriety, the petition should be dismissed.

In reply, petitioner contends that respondent's argument that the Board was not required to consider petitioner's Case Plan is contrary to a prior decision in which the Board of Parole's Appeals Unit ruled that, although an appellant had been incarcerated prior to the effective date of Correction Law § 71-a, the prisoner was entitled to *de novo* release consideration due to the Board's failure to consider his Case Plan, which had been prepared and was available at the time of his hearing. Verified Reply at ¶ 7.

Petitioner further contends that his objection to the Board's consideration of inaccurate

information in his COMPAS report was properly preserved because he raised the issue in his administrative appeal, which was the proper procedure to address a "defect that appears on the face of the record." *Id.* at ¶¶ 12-14. Such an issue need not have been raised at petitioner's parole hearing because it could not have been corrected by the Board at that time.

Petitioner clarifies that he does not argue that the Board is without power to deny parole based on the nature of his crime. *Id.* at ¶ 15. Rather, petitioner argues that the Board's decision fails to demonstrate that the nature of his crime evidences a "reasonable probability" that petitioner's release is incompatible with the welfare of society. *Id.*

Discussion

Standards for Review

It has become fundamental that release on parole is a discretionary function of the Parole Board. Provided that the determination of the Board follows statutory standards for such decisions, it will not be disturbed by a court, absent a showing that the decision is "irrational bordering on impropriety" and, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 NY 2d 470 (2000); *Matter of King v. NYS Div. of Parole*, 190 AD2d 423 (1st Dep't 1993), *aff'd*, 83 NY 2d 788 (1994); *Siao-Pao v. Dennison*, 51 AD3d 105 (1st Dep't 2008)

Executive Law §259-i(c)(A) provides that discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but rather after considering 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 the crime as to undermine respect for the law. *Matter of King*, 190 AD2d at 430.

The Parole Board is required to consider a number of factors in determining whether an inmate should be released. Executive Law §259-i requires the court to consider factors including, but not limited to, the institutional record (including program goals and accomplishments, vocational education, academic achievements, etc); release plans, including community resources, employment, education and training and available support services; any deportation order issued; the seriousness of the offense, with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the attorney and the pre-sentence probation report, and the prior criminal record. *Matter of Malone v. Evans*, 83 AD3d 719 (2nd Dep't 2011); *Siao-Pao v. Dennison*, 51 AD2d at106.

The Parole Board's decision need not specifically refer to each and every factor, nor must it give each factor equal weight. *Matter of King*, 190 AD2d at 431. The weight to be accorded to each statutory factor lies solely within the discretion of the Board. *Siao-Pao v. Dennison*, 51 AD3d at 108. However, it is incumbent on the Board to actually consider each applicable statutory factor and, "where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene." *Matter of King*, 190 AD2d at 431.

Executive Law §259-c[4] requires the Board to incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release. The 2011 Amendments to the Executive Law mandated the Parole Board to adopt procedures to assist members in determining which inmates may be released to parole supervision. *Matter of Thwaites v. NYS Board of Parole*, 34 Misc. 3d 694 (2011). Where the Board's determination includes consideration of all relevant statutory factors, including the criminal history, the instant offense, the [lack of] disciplinary infractions since the last appearance, program

and educational accomplishments and post-release plans, further judicial review is precluded. *Matter of Borcsok v. NYS Division of Parole*, 34 AD3d 961 (3rd Dep't 2006).

Conversely, however, when the Board denies parole, it is required to inform the inmate in writing of the factors and reasons for the denial, and "[s]uch reasons shall be given in detail and not in conclusory terms". Executive Law §259-i[2][a]; *Matter of Mitchell v. NYS Division of Parole*, 58 AD3d 742 (2nd Dep't 2009). A detailed written explanation is necessary to enable intelligent judicial review of the Board's decision. *Matter of West v. NYS Board of Parole*, 41 Misc. 3d 1214(A) (2013). The absence of such a detailed decision inappropriately forecloses the possibility of intelligent review. *Mayfield v. Evans*, 93 AD3d 98, 100 (1st Dep't 2010). The decision to deny parole cannot be based solely on the nature of the instant offense. *Winchell v. Evans*, 27 Misc. 3d 1232(A) (2010), citing *Wallman v. Travis*, 18 AD 3d 304, 307-08 (1st Dep't 2005).

A Parole Board's denial of parole which focused almost exclusively on the inmate's crime, while failing to take into account and fairly consider any of the other relevant statutory factors which categorically supported inmate's release, was arbitrary and capricious. Similarly, the Board's failure to explain, other than the facts of the crime, why the inmate's release was incompatible with public safety and welfare, could not be supported. *Matter of Morris v. NYS Dep't of Corrections and Community Supervision*, 40 Misc. 3d 226 (2013).

Petition

In the instant matter, the Court cannot find, as a matter of law, that the Board's hearing focused exclusively on petitioner's crime. In the hearing, the Board raised the issue of petitioner's actions since his previous interview, noting his completion of ART and IPA training, his work in the law library, as a recreation aide, and as a porter. The Board additionally noted petitioner's letters of

support and letters from persons willing to hire petitioner upon his release.

However, the decision of the Board is another matter. Although the serious nature of the crime remains "acutely relevant" in determining whether petitioner should be released, the Board must still take into account and fairly consider the other relevant statutory factors. *Matter of West*, 41 Misc. 3d at 1214(A). In its decision, the Board's only clear focus was on the subject conviction, thus supporting the premise that the decision was pre-determined.

Such intent is corroborated by the "boilerplate" decision, which contains the statutory language and the "terse, conclusory sentences" that "[t]he Board 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 needs for successful re-entry into the community. Your release plans have also been considered.". *See id.*

Even more convincingly, in *Matter of Thwaites*, the Board's decision stated:

> **After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted,** as is your improved disciplinary record. **This panel remains concerned, however, about** your history of unlawful conduct, the gracity (sic) of your instant offense and the disregard displayed for the norms of our society, **when considered with the required relevant factors leads to the conclusion that** your discretionary release is inappropriate at this time and **incompatible with the welfare of the community** and would so deprecate the seriousness of your crime as to undermine respect for the law. (Emphasis added)

Upon review, the Court found that this language, although referencing the "positive" factors, relied almost exclusively on the nature of petitioner's crime. 34 Misc. 3d at 700. While the petitioner's accomplishments and release plans were noted, the decision focused on the circumstances of the crime committed nearly 25 years earlier. *Id.*

Reasoning that employs past-centered rhetoric and not future-focused risk assessment

analysis is inconsistent with the rational determination of the inquiry at hand, to wit: whether the inmate can live and remain at liberty without violating the law and whether his release is incompatible with the welfare of society and does not deprecate the seriousness of his crime so as to undermine respect for the law. *Id.*, citing Executive Law §259-i[2][c].

The Court in *Matter of Thwaites* found the Board's decision to be arbitrary and capricious, irrational and improper based on the Board's failure to articulate any rational, non-conclusory basis, other than its reliance on the seriousness of the crime, why the Board could not believe there was a reasonable probability that the petitioner could live and remain at liberty without violating the law, and that his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law. *Id.* at 701

Similarly, in *Matter of Morris*, the Court found that a "passing mention" of petitioner's accomplishments and document submissions, and conclusory statements that statutory factors were considered, were "woefully inadequate" to demonstrate that the Board weighed or fairly considered the required statutory factors. 40 Misc. 3d at 234; *Matter of West*, 41 Misc. 3d at 1214(A).

Although the Board need not specify each statutory factor in its decision, it must do "more than merely mouth" those criteria, particularly where, as here, factors recited in the interview, other than the crime itself, militated heavily in favor of release. *Weinstein v. Dennison,* 7 Misc. 3d 1009(A)(2005). The Parole Board's determination must be sufficiently detailed to apprise petitioner of the reasons for the denial of his parole. *Matter of Stokes v. Stanford*, 2014 NY Slip Op. 50899(U) (June 9, 2014), *citing Matter of Davis v. Travis*, 292 AD2d 742 (3rd Dep't 2002).

In this matter, the Board's decision appears to have accorded no weight to any factor apart from the seriousness of petitioner's offense. *See Winchell v. Evans*, 27 Misc. 3d at 1232(A). For

respondents to have simply restated the usual and predictable language contained in so many parole release decisions, with no specificity or other explanation to justify parole denial, is unacceptable. *Bruetsch v. NYS Department of Corrections and Community Supervision*, 43 Misc. 3d 1223(A) (2014). To simply defer to its conclusion leaves the reviewing court to guess at the basis for the Board's denial. *Vaello v. Parole Board Div. of the State of New York*, 48 AD3d 1018, 109 (3rd Dep't 2008); *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013).

The Court is unable to determine, by reading the transcript of the Board's decision, what factors, if any, other than the nature of petitioner's offense were considered. Such a patently inadequate decision inappropriately forecloses the possibility of intelligent review. *Mayfield*, 93 AD3d at 100.

On the basis of the foregoing, the Court concludes that petitioner has adequately established his contention that the Parole Board's determination was arbitrary and capricious, irrational and improper; and petitioner is thus entitled to a new hearing. In light of this conclusion, and in light of petitioner's acknowledgment that his grievance regarding the inaccurate information in his COMPAS report has been resolved in his favor, petitioner's claim that he is entitled to a *de novo* hearing on the basis of the Board's consideration of inaccurate information is moot. Petitioner's corrected COMPAS instrument will presumably be available for the Board's consideration at the *de novo* hearing ordered herein.

The Board in this instance issued a boilerplate decision that simply recites statutory language and fails to articulate any rational, non-conclusory basis, other than the Board's reliance on the seriousness of the crime, why the Board could not believe there was a reasonable probability that the petitioner could live and remain at liberty without violating the law, and that his release was not

incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law.

The instant matter, like so many others, arises from the Board's failure to abide by statutory mandates. The Board is without authority to ignore the command of the Legislature. In continuing to issue such manifestly inadequate decisions despite a clear Legislative mandate, and in the face of so many cases in the courts of this state which reinforce that mandate, the Board is essentially thumbing its nose at the Legislature and the courts. Such behavior cannot be condoned.

Until the Board begins to satisfy the mandates issued by the Legislature, the duplication of the Board's work will continue. The courts of this state are constrained to remand to the Board all cases, like the instant matter, in which the Board has issued a decision that is so woefully deficient that it fails to apprise the prisoner of the reasons for his denial of release, and is so lacking in detail that it forecloses the possibility of intelligent appellate and judicial review.

The Legislature has made clear the sort of explanation to which a prisoner who has been denied parole is entitled. The courts will continue to enforce the requirement announced by the Legislature so long as it remains necessary. However, for the courts of this state to repeatedly entertain petitions and issue decisions ordering *de novo* parole hearings because the Board fails to follow a clear statutory standard is wasteful of the time of all involved and of the resources of the State. The Board's failure to provide detailed, non-conclusory reasons for its denials of release cannot continue.

The June 26, 2013 decision of the Board of Parole is hereby vacated, and this matter is remanded to the Board of Parole. Within 30 days of the date of the service of a copy of this Order, with notice of entry, petitioner shall be entitled to a new parole hearing consistent with this decision

and the mandates of Executive Law §§259-c and 259-i. The new hearing shall be held before a different panel of the Parole Board.

This decision shall constitute the order of the Court.

Dated: February 25, 2016
Goshen, New York

ENTER:

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