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STATE OF NEW YORK
SUPREME COURT

ORIGINAL

ALBANY COUNTY

In the Matter of the Application of
CARLOS RODRIGUEZ, #10-A-4342,

Petitioner.

-against-

DECISION
AND
JUDGMENT

THE NEW YORK STATE DIVISION OF PAROLE
AND ANDREA W. EVANS, CHAIRWOMAN OF THE
STATE BOARD OF PAROLE AND CHIEF EXECUTIVE
OFFICER OF THE NEW YORK STATE DIVISION
OF PAROLE,

Respondent(s).

For a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules of the State of New York.

Index No. 3932-12
(RJ No. 01-12-ST3880)

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

CARLOS RODRIGUEZ, #10-A-4342
Self Represented Petitioner
Elmira Correctional Facility
P.O. Box 500
Elmira, New York 14902

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
Attorney for Respondents
(Laura A. Sprague, of counsel)
The Capitol
Albany, New York 12224

Hon. Richard M. Platkin, A.J.S.C.

Petitioner is an inmate at the Elmira Correctional Facility who was sentenced to serve an indeterminate sentence of 2 1/2 to 5 years of imprisonment as a second felony offender following his conviction for Criminal Possession of a Weapon ("CPW") in the 3rd Degree. He brings this CPLR article 78 proceeding challenging respondents' determination of October 18, 2011, which denied him release to parole and ordered him held for reappearance in 24 months.

The verified petition alleges principally that the Parole Board failed to consider petitioner's institutional achievements and certain other required statutory factors, improperly focused on the nature of the instant offense, violated petitioner's right to due process, effectively resentenced him and failed to apply risk assessment criteria in rendering the challenged determination.

The latter claim, concerning risk assessment criteria, arises out of amendments to Executive Law §§ 259-i (2) (c) and 259-c (4) enacted by the State Legislature in 2011 ("the 2011 Amendments"). Specifically, Executive Law § 259-c (4) was amended to require the Parole Board to "establish written procedures for its use in making parole decisions as required by law." These procedures "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (*id.*). Additionally, Executive Law § 259-i (2) (c) was amended to consolidate into a single statute all of the factors that the Parole Board must consider in evaluating requests for discretionary release on parole. There is no dispute that the 2011 Amendments are applicable to the instant application.

In a memorandum dated October 5, 2011, the Chairwoman of the Board of Parole,

Andrea W. Evans, set forth the following guidance regarding the 2011 Amendments:

As you know, members of the Board have been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ("TAP"). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board were afforded training in the use of the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool to understand the interplay between the instrument and the TAP instrument, as well as understanding what each of the risk levels mean.

Please know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. . . . Therefore, in your consideration of the statutory criteria set forth in Executive Law § 259-i (2) (c) (A) (i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

In this case, there was no transition accountability plan ("TAP") or formal risk-assessment instrument prepared for petitioner.¹ Nonetheless, the administrative record does

¹ Pursuant to Corrections Law § 71-a, which became effective on September 30, 2011, a TAP shall be developed "[u]pon admission of an inmate committed to the custody of the department". However, petitioner was received into custody on or about September 9, 2010.

reflect that the Parole Board - through its review of petitioner's inmate status report, other institutional records and the personal interview - considered the steps taken by petitioner towards his rehabilitation and evaluated his likelihood of success if released to the community on parole supervision. Thus, in denying parole, respondents explained that the crime of conviction, possession of a loaded handgun, occurred while petitioner was on parole for manslaughter and criminal use of a firearm. In the Parole Board's judgment, petitioner's conduct demonstrated a tendency towards violence and a willingness to have and use deadly weapons. Additionally, petitioner's possession of a loaded weapon while on parole was found to have demonstrated a poor adjustment to community supervision. And with respect to the steps taken by petitioner toward effecting his rehabilitation, the Board recognized petitioner's completion of certain programming, but expressed particular concern that petitioner was denied an EEC due to behavior issues. Under the circumstances, the Court is satisfied that the Board of Parole sufficiently incorporated risk and needs principles in measuring petitioner's rehabilitation and assessing his likelihood of success if released, as required by the new legislation and in accordance with the written procedures distributed by the Chair of the Parole Board.

As noted above, Executive Law § 259-i (2) (c) now sets forth in a single section of law all of the factors that must be considered by the Parole Board in evaluating requests for discretionary release. These factors generally consist of: the inmate's institutional record; release plans; performance in any temporary release program; deportation orders; statements of the crime victim (or family members); the length of determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to Penal Law §§ 70.70 or 70.11 for certain enumerated felonies; the seriousness of the offense, including consideration of the pre-sentence

report; any recommendations of the sentencing court; and the inmate's criminal record, including the nature and pattern of offenses and any previous probation or parole supervision.

Here, the record demonstrates that the Parole Board considered all of the required statutory factors in rendering its determination. The Parole Board had before it petitioner's institutional record, including his inmate status report, pre-sentence report and the letters of support submitted on his behalf. In the interview, Board members reviewed with petitioner his programming accomplishments including his completion of the ART program and his continuing studies of general business as part of the ASAT program. Additionally, the Board discussed with petitioner his plans upon release, which consisted of petitioner residing either with his sister in a high security building or in a rehabilitation center. Thus, petitioner has failed to demonstrate any non-compliance with Executive Law § 259-i (see *Matter of Cox v New York State Division of Parole*, 11 AD3d 766, 767, lv denied 4 NY3d 703 [2005]).

Further, the Parole Board "is not required to give equal weight to each statutory factor" (*Matter of Zhang*, 10 AD3d at 829; *Matter of Collado v New York State Div. Of Parole*, 287 AD2d 921, 921 [3d Dept 2001]). Thus, while petitioner has endeavored to participate in institutional programming, the Parole Board, in its discretion, must also weigh factors such as the gravity of the underlying crime in order to determine "whether his release is compatible with the welfare of society" (*Matter of Richards v Travis*, 288 AD2d 604, 605 [3d Dept 2001]). Indeed, petitioner's possession of a loaded handgun while on parole release for manslaughter and criminal use of a firearm certainly bears on "whether his release is compatible with the welfare of society" (*Matter of Richards v Travis*, 288 AD2d 604, 605 [3d Dept 2001]). And the Parole Board's decision to accord greater weight to the gravity of the instant offense and the

compatibility of petitioner's release with the welfare of society does not establish that the Board failed to give due consideration to the other statutory factors. And there is no requirement that the Parole Board discuss each factor in rendering its decision.

The Court further rejects petitioner's claim that his constitutional right to parole has been violated. Petitioner has no protected liberty interest in obtaining release on parole (see *Matter of Warren v New York State Div. of Parole*, 307 AD2d 493, 493 [3d Dept 2003]; *Matter of Vineski v Travis*, 244 AD2d 737, 738 [3d Dept 1997], *lv denied* 91 NY2d 809 [1998]), and the record fails to establish any procedural violations. And petitioner's contention that the Board's denial of parole or its 24-month hold amounted to a *de facto* re-sentencing is without merit (*Matter of Marsh v New York State Div. of Parole*, 31 AD3d 898 [3d Dept 2006]).

As petitioner has failed to demonstrate that the Parole Board's determination as a whole demonstrates irrationality bordering on impropriety or is affected by a violation of law, there is no basis for judicial intervention (see *Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *Matter of Cox*, 11 AD3d at 767).

Accordingly,² the petition is dismissed.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment and the *in camera* materials are being returned to counsel for the respondents; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

² The Court has considered petitioner's remaining arguments and claims and finds them all to be without merit.

Albany, New York
Dated: November 29, 2012



Richard M. Platkin, A.J.S.C.

Papers Considered:

Verified Petition, sworn to July 5, 2012, with attached exhibits A-K;

Verified Answer, dated October 1, 2012;

Affirmation of Terrence X. Tracy, Esq., dated September 28, 2012, with attached exhibits A-C;

Affirmation of Laura A. Sprague, Esq., dated October 1, 2012, with attached exhibits A-J;

Petitioner's Reply, sworn to November 8, 2012.