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Decision in CPLR Article 78 proceedings - Rossakis, Niki

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FPR Jed Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X

In the Matter of NIKI ROSSAKIS,

Petitioner,

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

-against-

NEW YORK STATE PAROLE BOARD,

Respondent.

-----X

DECISION/ORDER
Index No.: 401072/2012
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
PETITION AND AFFIDAVITS ANNEXED	1-2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	6-11
ANSWERING AFFIDAVITS	4
REPLYING AFFIDAVITS	5
EXHIBITS	
STIPULATIONS	
OTHER (memo of law)	3

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner, pursuant to an Article 78 proceeding, seeks an order vacating a determination of respondent New York State Board Of Parole, rendered on June 28, 2011, denying a release on parole and ordering a new hearing. Respondent opposes.

After a review of the instant petition, all relevant statutes and case law, the Court **grants** the petition.

Factual and procedural background:

According to petitioner, she is now a 50 year old woman, currently incarcerated for shooting her husband in the head in 1993, with his own licensed gun. She claims that when she shot him, she was fearful that he was going to force her to have sex, despite the fact that she was still healing from an abortion that she had undergone two weeks earlier as a result of his raping her, and also at his insistence.

Petitionor and her husband were married in 1987, and the abuse commenced soon after. She contends that the shooting was the culmination of years of various forms of both physical and emotional abuse that had been escalating over the years. The alleged abuse included physical and sexual assaults, emotional degradation, isolation and continuous threats to her life. After petitioner's arrest, she was remanded to jail. After some time, she was able to make bail and was placed on house arrest. However, she was subsequently re-arrested, this time in Suffolk County, wherein during a doctor's appointment, she stole a sheet from his prescription pad and forged his signature in an attempt to procure Fiorinal from a pharmacy.

Following a three week trial in Queens County, petitioner's battered spouse-justification defense was rejected by the jury and on May 17, 1996, she was convicted of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. She was sentenced to an indeterminate term of 23 years to life imprisonment. On appeal, the Appellate Division, Second Department, determined that the original sentence imposed by the trial court was "excessive," and consequently reduced the sentence to the minimum possible term of 15 years to life (*see* People v. Rossakis, 256 A.D.3d 366 [2d Dept. 1998]). Petitioner is currently incarcerated at Bayview Correctional Facility, New York, New York, and has been for nearly 18 years.

Respondent New York State Board of Parole, hereinafter, the "Board"), is a State body charged, *inter alia*, with conducting parole release hearings in accordance with the provisions set forth in the Correction Law, Executive Law and Penal Law.

Petitioner maintains that during her incarceration, she has made concerted efforts to improve herself. She asserts that she has successfully completed various programs sponsored by the prison system and has attained two Associates' Degrees. Petitioner has also worked as a teaching assistant, a tutor, and also as an Inmate Liason Committee Representative, wherein she assists inmates and staff in resolving inmate grievances. Additionally, she has worked as a telephone operator in the Department of Motor Vehicles customer service program at Bayview.

Petitioner alleges that despite her accomplishments while incarcerated, and the remorse she has continuously exhibited for the shooting, she has been unjustly denied parole on two separate occasions. In 2009, she appeared before the Board for the first time. She asserts that during the interview, the members of the Board questioned her extensively concerning the circumstances of her crime and also discussed her disciplinary record. She was subsequently denied parole. In rendering their decision the Board stated that "[w]hile the panel notes your programmatic accomplishments in prison, the panel finds more compelling the seriousness of the offense as well as your lack of insight into your criminal conduct. The panel concludes that if released at this time, there exists a reasonable probability you would not live and remain at liberty without further violations of the law. Your cold blooded murder of your husband indicates a premeditated act of violence" (see Transcript of Parole Board Hearing, July 1, 2009 p. 15).

In 2011, petitioner appeared for her second hearing, held before a panel comprised of different Commissioners. During this hearing, she claims that she was again questioned extensively

about the circumstances of her crime. The Board ultimately denied her release, stating in pertinent part that "release at this time is incompatible with the welfare and safety of the community. This decision is based on the following factors: [t]he serious nature of the instant offense....[which] involved you shooting your husband in the head causing his demise. Your actions clearly displayed a propensity for violence and a callous disregard for the sanctity of human life.....Discretionary release is inappropriate at this time. For the panel to hold otherwise would so deprecate the severity of the crime as to undermine respect for the law" (see Transcript of Parole Board Hearing, p.12).

Petitioner filed an administrative appeal on December 8, 2011. The Appeals Unit affirmed the Board's denial of parole on May 22, 2012. Petitioner now commences the instant Article 78 proceeding.

Respondent asserts that petitioner shot her husband in the head as he lay sleeping in bed and while their two small children were in the house. It also asserts that petitioner has provided contradictory versions of the events that transpired on January 21, 1993. She advised the Board that "[i]t's a blur. But from what I read, I washed [the gun] off and put it back in the night stand drawer. I thought I dropped it...." (see Verified Answer p.14, par. 45 referencing the transcript of 2011 Parole Hearing, annexed as Exhibit "E," p. 4).

Moreover, at the precinct following the shooting, petitioner claimed that she "dropped the handgun and went downstairs to get her children ready for school, that she then wet a dish towel, cleaned off the handgun and checked her husband to see if he still had a pulse," and finally "placed the handgun back in the drawer and took my son to school" (see Verified Answer p. 14, par. 45 referencing the Inmate Status Report dated July 2011, annexed as Exhibit "A"). Additionally, respondent references petitioner's brother-in-law's testimony at the sentencing hearing, wherein he

testified that he believed that petitioner may have killed her husband for financial gain. Furthermore, respondent refers to aspects of petitioner's hearing testimony wherein she claims that she called the police on only one occasion, despite being assaulted numerous times by her husband.

Positions of the parties:

Petitioner proffers several arguments challenging the Board's 2011 determination, which the Court shall address individually. First, petitioner argues that "(1) by deciding that the nature of the crime alone merits a longer term, the Board has disregarded the Appellate Division's reduction of her sentence to 15 years to life, and instead unlawfully granted itself the sole power to determine the appropriate sentence, thereby usurping the function of the Legislature and the Courts."

Petitioner argues that not only was the Board's decision a blatant abuse of discretion, its decision manifests an unreasonable and illegitimate rejection of the Appellate Division's determination, which on its own, warrants a *de novo* hearing. She also argues that a Board's exclusive reliance on the severity of the offense as the rationale to deny parole contravenes the intent of Executive Law§ 259-1(2)(c).

Petitioner also argues that "by giving only superficial consideration, if at all, to any factors other than the nature of the crime, including all of [her] institutional accomplishments, her tremendous community support, and her sincere expression of remorse, the Board has violated the 2011 amendment to the Executive Law, N.Y. Laws 2011, ch. 62, Part C, Subpart A, § 38-b, which requires the Board to focus on the rehabilitation and likelihood of success of the individual instead of the crime committed many years ago."

Petitioner asserts that effective March 31, 2011, the Executive Law was amended so as to modernize the work of the Parole Board, by promulgating new procedures to be utilized by them.

The new procedures "shall incorporate risk and needs assessment instrument 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." Essentially, petitioner argues that the recent amendments to N.Y. Executive Law 259 apply retroactively, and thus, entitles her to a *de novo* parole hearing. Petitioner argues that the Board failed to properly apply these criteria in rendering its decision to deny her parole, in that they failed to proffer any reasoned consideration to her rehabilitation and likelihood of success upon release. Therefore, their decision must be vacated.

Respondent refers to and relies on the transcript minutes of petitioner's interview to substantiate its position that the Board considered all the mandatory statutory criteria and discussed them with her, prior to rendering its decision. It asserts that the Board discussed petitioner's instant offense and attendant circumstances, while also affording her the opportunity to explain her arrest for forging a prescription while awaiting trial on the murder charge; recognized that she had completed her Associate's degree; her one infraction during her incarceration and discussed her plans upon her prospective release.

Respondent argues that pursuant to Executive Law 259-I, the Board must consider criteria which are relevant to the specific inmate. Therefore, the fact that the Board did not discuss each aspect of every factor with petitioner during her interview does not constitute convincing evidence that the Board failed to consider the necessary criteria/factors.

Respondent further argues that even if the Court were to find that the Board accorded greater weight to the severity of the crime, as opposed to petitioner's rehabilitation efforts and institutional accomplishments, it would not render the denial of parole for this reason irrational or improper.

Petitioner also argues that "the Parole Board's decision to deny release to [her] was arbitrary and capricious and an abuse of discretion where the Board denied parole for the second time solely on the basis of the nature of the offense, and where the board baldly concluded that [she] displayed "a propensity for violence and a callous disregard for the sanctity of human life," without any evidentiary support or record support for such statements, and failed to specify any reasons why her release would "so deprecate the severity of the crime as to undermine respect for the law" the Board has acted in an arbitrary and capricious manner and has abused its discretion" (Notice of Petition, p.1-2).

Respondent responds that the Board's determination was made in accordance with the law and did not usurp the function of the legislature or courts and thus, was not arbitrary or capricious. It argues that there is no entitlement to parole release and because inmates have no liberty interests at stake in parole release hearings, the protections commensurate with the Due Process Clause are inapplicable. Additionally, respondent argues that a decision rendered by the Board cannot be disturbed in the absence of a convincing demonstration that petitioner was affected by irrationality bordering on impropriety.

Respondent references petitioner's various renditions of the subject event and argues that this is indicative of petitioner's lack of credibility and a failure to accept responsibility for her actions. Respondent also argues that the recent amendments to Executive Law 259 do not entitle petitioner to a new parole hearing. Additionally, respondent refers to the transcript of petitioner's parole hearing of June 28, 2011,wherein she was unable to recall the exact details of her crime and also to the "Inmate Status Report," dated July 2011, where she admits to wiping the gun clean and placing it back in the drawer after the shooting, as legitimate reasons for the Board to harbor concern about

her propensity for violence. Respondent also refers to specific portions of testimony which indicated petitioner's varying versions of the shooting that she told the police.

Conclusions of law:

It is axiomatic that in an Article 78 proceeding, the court's function is to determine whether the action of an administrative agency, had a rational basis or was arbitrary and capricious (*see* Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 230-231 [1974]).

Pursuant to Executive Law § 259-i(2)(c), the New York Board of Parole "is required to consider a number of statutory factors in determining whether an inmate should be released on parole" (Matter of Gelsomino v. New York State Bd. of Parole, 82 A.D.3d 1097,1098 [2d Dept. 2011]; *see also* Matter of Miller v. New York State Bd. of Parole, 72 A.D.3d 690, 69; Matter of Mitchell v. New York State Bd. of Parole, 58 A.d.3d 742, 743

These specific factors are: "(1) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim; and (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence

pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law......"

"The Parole Board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered" (Matter of Gelosimo v. New York State Bd. of Parole, 82 A.D.3d at 1098,1097 [2d Dept. 2011]; *see also* Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 8791 [1994]; Matter of Walker v. Travis, 252 A.D.2d 360, 362 [1st Dept. 1998] see Matter of Phillips v. Dennison, 41 A.D.3d 17, 21-23 [1st Dept. 2007], *lv dismissed* 9 N.Y.3d 956 [2007])

" A parole determination may be set aside only when the determination to deny the petitioner release on parole evinced "irrationality bordering on impropriety" (Matter of Martinez v. New York State Div. of Parole, 73 A.D.3d 1067, 1067 [2d Dept. 2010]; (Matter of Silmon v. Travis, 95 N.Y.2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 77 [1980]; *see also* Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235 [1st Dept. 1997], *lv denied* 81 N.Y.2d 762 [1992]).

Indeed, "[t]he burden is on the petitioner to make a convincing demonstration of entitlement to such relief" (Martinez, 73 A.D.3d at 1067; *see also* Matter of Midgette v. New York State Div. of Parole, 70 A.D.3d 1039, 1040 [2d Dept. 2010]). "However, 'where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally' "(Gelsomino, 82 A.D.3d at 1098; quoting Matter of Huntley v. Evans, 77 A.D.3d 945, 947 [2d Dept. 2010]).

Moreover, while the Parole Board is accorded broad discretion in deciding what weight should be given to each of the factors listed, the reasons for denying parole must "be given in detail

and not in conclusory terms" (Executive Law 259-i(2)(a) and denial may not focus exclusively on the seriousness of the crime (*see* Matter of Phillips v. Dennison, 41 A.D.3d 17 [1st Dept. 2007, *lv dismissed* 9 N.Y.2d 3d [2007]; Matter of Walker v. Travis, 252 A.D.2d 360, 362 [1st Dept. 1998]; Guzman v. Dennison, 32 A.D.3d 798 [1st Dept. 2006]; Almonor v. New York State Bd. of Parole, 16 Misc.3d 1126(A) (Sup. Ct. N.Y. County 2007)).

The Court has reviewed the transcribed testimony of both petitioner's July 1, 2009 and June 28, 2011 parole hearings. In the 2009 hearing, while the Board asked extensive questions concerning the shooting, they also asked petitioner about her institutional disciplinary record, and if released, where she intended to live, and what type of job she would attempt to procure. However, it is clear that at the 2011 hearing, the Board based its determination solely upon the seriousness of petitioner's crime, something they are statutorily prohibited from doing (King, 190 A.D.2d at 432-433; *see also* Matter of Johnson v. New York State Div. of Parole, 65 A.D.3d 838, 839 [4th Dept. 2009]).

Indeed, the Board concentrated solely on petitioner's crime, the circumstances leading up to it and immediately following it, her thought process prior to and after the shooting, and contradictory statements she made to police. No inquiries were made as to any rehabilitative efforts made, or prospective plans if release were to become a reality. While the Court understands that the severity of the crime necessitates some semblance of inquiry and discussion, a hearing that is devoted entirely to the crime, to the exclusion of anything else is arbitrary and capricious, and in clear violation of the statute. Where the Parole Board "focuses, almost entirely on the nature of a petitioner's crime, there is a strong indication that the denial of parole is a forgone conclusion' and does not comport with th statutory scheme" (Stanley v. New York State Bd. of Parole, 31 Misc.3d

911 (Sup. Ct. Orange County, 2011), quoting Matter of King v. New York State Division of Parole, 190 A.D.2d 423, 424 [1st Dept. 1993], *affd* 83 N.Y.2d 788 [1994]).

In consideration of the aforementioned, the Court finds that petitioner has made a convincing demonstration of entitlement to having the Court set the determination of the Board aside. The record clearly demonstrates that the Board failed to consider the statutory factors set forth in Executive Law § 259-i(2)(c), and that it denied her application for parole based solely on the seriousness of her crime, thus evincing irrationality bordering on impropriety.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the petition is granted, and the Parole Board's recent recommendation denying petitioner's release is struck down, and a new hearing is to be conducted; and it is further

ORDERED that petitioner shall serve a copy of this order on respondent and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: May 2, 2013

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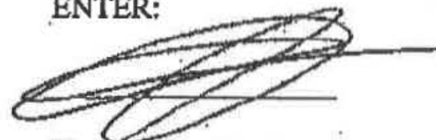

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT