December 2019

Decision in Art. 78 proceeding - Cassidy, Michael H. (2014-07-18)

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

MICHAEL H. CASSIDY,

Petitioner,

DECISION AND ORDER

For a Judgment Pursuant to CPLR Article 78

INDEX NO.: 2255/2014
Returnable: 5/29/14

-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 by petitioner for an order and judgment pursuant to Civil Practice Law & Rules Article 78:

PAPERS	NUMBERED
Notice of Petition/Verified Petition	1 - 2
Affirmation in Support/Exhibits A-I.	3 - 15
Petitioner's Memorandum of Law	16
Answer and Return/Exhibits 1-7	17 - 24
Affidavit of Tracy (Exhibit 8 to Answer) with Exhibits	25
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Petitioner Michael H. Cassidy (Petitioner) seeks an order and judgment pursuant to Civil Practice Law & Rules Article 78 granting the following relief: (A) annulment of the Parole Board's June 26, 2013 Decision denying him parole; (B) his application for parole; (C) a *de novo* parole hearing; and (D) an award of costs and reasonable attorneys' fees.

Background and Procedural History

Petitioner is serving an indeterminate sentence of 25 years to life, after pleading guilty to the second degree murder of a former girlfriend in 1984, when petitioner was 24 years old. He had no prior violent criminal history and has been in prison for nearly thirty years.

He first appeared before the Parole Board in 2009 and appeared again in 2011. Each time parole was denied. On June 25, 2013, he sat for his third parole hearing. Prior to his hearing, on or about March 28, 2013, petitioner was evaluated by the COMPAS Reentry Assessment System, receiving favorable ratings, showing low risk for violence, re-arrest, absconding, or criminal involvement. There was no "potential faking concern" or "inconsistent response concern" (Affirmation in Support, Exhibit B).

During the hearing, petitioner was questioned extensively about the circumstances of his 1984 offense. (Affirmation in Support, Exhibit C) He was asked about allegations of deception about his financial circumstances and having used a credit card that did not belong to him. Petitioner acknowledged that he had been an angry adolescent and young man, who abused alcohol and was kicked out of the military for that behavior. (Exhibit C, page 4) He acknowledged having abused alcohol and drugs since his teens and that his thinking at the time was based in fictions he would never have been able to sustain. (Exhibit C, page 5) Petitioner was specifically asked whether there had been prior violence between him and his victim (his former girlfriend), and whether she had been afraid of him. He acknowledged that there had been verbal violence, and she was afraid of "the way [he] was...and rightly so." (Exhibit C, pp. 5-6) He acknowledged that for the first 15 years of his sentence, he continued those behaviors; he had stopped such behavior, however, since 1997. (Exhibit C, pp. 7-8)

The Board noted petitioner's efforts at rehabilitation, including substance abuse courses, aggression replacement training (ART), Veterans' programs, physical education and legal research. (Exhibit C, page 7) Petitioner listed some of his course work and programs which had been completed, including network and parenting and healthy marriage classes. He acknowledged receiving one Tier II disciplinary ticket in 2008, but no other infractions since 1999.

The Board questioned petitioner about his plans, if he were released. Petitioner advised that he planned to reside with his father, and had secured employment at a paper manufacturing company. (Exhibit C, pp. 8-9) Petitioner acknowledged responsibility and expressed remorse for the crimes he committed. (Exhibit C at pp. 4, 7)

The Board advised Petitioner that, although his COMPAS results were low across the board, particularly with those issues with which they were most concerned (future violence, risk of arrest and risk of absconding), they had community opposition to his release and had to consider it, as well. (Exhibit C at page 9) Petitioner acknowledged that and asked whether that opposition could ever be overcome. He was told that, if the only reason to keep him in was opposition, "at some pont, that loses its potency" and would not be a basis to keep somebody in prison forever. (Exhibit C at page 11)

At the conclusion of the hearing, the Board denied parole, and held petitioner for an additional 24 months, to June 2015. The Decision, a written copy of which was dated June 26, 2013, stated:

> After a review of the record and interview, the panel has determined that if released at this time, there's a reasonable probability that you would you would not live and remain at liberty without again violating the law and 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.

> This decision is based on the following factors: I.O.'s are is/are Murder in the 2nd Degree, in which you beat, choked, stabbed and nearly eviscerated Ms. Biasi after she ended your relationship.
>
> Note is made of your sentencing minutes, COMPAS risk assessment, rehabilitative efforts, risks, needs, parole plan, community opposition to your release, clean disciplinary record, remorse, insight, positive presentation and all other required factors.
>
> Your brutal and merciless offense occurred after your deceit, temper and drinking resulted in the termination of your relationship. The extreme level of violence you exhibited is of grave concern. Parole is denied. (Exhibit C at pp. 12-13)

On July 2, 2013, petitioner filed an administrative notice of appeal and filed his brief, perfecting the appeal on October 25, 2013. (Petition at ¶2) No decision was rendered within the four-month window provided by statute. 9 NYCRR §8006.4 (a)(2) Thus, by operation of law, petitioner was entitled to deem his administrative remedy exhausted and seek judicial review of the Parole Board's July 26, 2013 determination. 9 NYCRR §8006.(c)

This matter was commenced by Notice of Petition and Petition on or about March 26, 2014. Thereafter, on or about May 14, 2014, the Department of Corrections and Community Supervision (DOCCS) Board of Parole Counsel's Office dismissed the administrative appeal as moot due to litigation. (Exhibit A to Reply Affirmation)

Petition and Answer

The Petition and supporting papers allege that the Parole Board's June 26, 2013 decision is arbitrary and capricious and contrary to the law. (Petition at ¶3) Specifically, petitioner asserts that the Board ignored an "overwhelming majority of factors" weighing in favor of his release, and instead issued a decision which is contradicted by the facts, impermissibly conclusory and violates the Executive Law. (Petition at ¶34)

He asserts that the Board failed to fairly and genuinely consider all of the factors as 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 institutional record, program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates. They further failed to take into consideration his release plans, including the educational, training and support services available to him, as well as his lack of a prior record. (Petition at ¶¶ 38, 45-47, 96-100)

Petitioner further alleges that the Board's decision fails to meet the standards of Executive Law §259-i(2)(A) and 9 NYCRR §8002.3(d), which require that the reasons for the denial of parole must be stated in detail. (Petition at ¶42) He asserts that the decision was wholly conclusory and fails to detail its reasoning, as required by the Executive Law. (Petition at ¶43,103-107) The only explanation for the denial of parole is the "grave concern" about the seriousness of petitioner's offense and includes no other reasons. Petitioner asserts that this evidences the Board's failure to take any other factor into consideration (Petition at ¶50) and that the denial was an "unlawful foregone conclusion." (Petition at ¶56)

Petitioner asserts that failure to offer a detailed explanation for their conclusions is insufficient as a matter of law. (Petition at ¶¶ 57-60) The omission of explanation, combined with the apparent disregard for the positive factors outlined in the petition, including his "outside clearance" (argued for the first time in the Petition), render the decision both arbitrary and capricious. (Petition at ¶¶ 67-72, 108-113, 120)

Petitioner asserts that the Parole Board failed to establish and utilize written procedures in their parole determinations, as required by the 2011 Amendments to the Executive Law, despite the passage of more than two years since the new legislation was enacted. (Petition at ¶¶ 73-76, 114-

117) He argues that the October 5, 2011 internal memorandum of former Chair Andrea Evans (Supporting Affirmation, Exhibit E) acknowledged the Board's delay in establishing written criteria and, moreover, incorrectly advised Parole Board personnel that the amendments did not change any criteria for the review and granting of parole. (Petition at ¶78) Not until December 2, 2013, almost six month after petitioner's hearing, were the requisite rules finally filed. (Petition at ¶87, Supporting Affirmation at ¶7, and Exhibit F) Petitioner posits that the lack of procedural rules meant that the Board failed to take into consideration the available COMPAS Risk Assessment. (Petition at ¶89).

Finally, petitioner argues that the amendments to Correction Law §71-a, effective October 1, 2011, required the development of a Transitional Accountability Plan (TAP) to provide additional information about risks and needs principles. (Petition at §90) Although TAPs were developed before Petitioner's hearing date, no such instrument was prepared or utilized in his hearing, thus rendering the decision contrary to the requirements of law. (Petition at §§ 90-92, 122-124)

Petitioner avers that these failures deprived him of his due process rights under the Constitutions of New York and the United States. (Petition at ¶126)

In its Answer, respondent appears to argue that petitioner had not yet exhausted his administrative appeal (Answer and Return at ¶3); however, that argument has been rendered moot by the subsequent action of the Parole Board, as aforesaid.

In all other respects, respondent argues that petitioner's claims are without merit. The Board is entitled to exercise its independent judgment in weighing any statutory factor in making its determination. In so doing, the Board may place greater weight on an inmate's criminal conduct than upon his institutional adjustment and release plans; and a denial based on the determination that

the inmate's achievements are outweighed by the severity of his crimes is within the Board's discretion. (Answer and Return at ¶5)

Nor is the Board required to articulate the weight accorded to each factor. The Board is required to and, in the instant matter, did consider the COMPAS assessment, but may place whatever weight it deems appropriate on that information. (Answer and Return at ¶7) The Board may further exercise complete discretion in controlling the nature and scope of the subject matter of the interview; no due process right attaches to such interview. (Answer and Return at ¶8)

In the instant matter, respondent asserts that the record reveals that the Board considered all the required factors and supported its determination that the extremely serious nature of the offense was incompatible with the welfare of society and revealed a reasonable probability that petitioner would re-offend. If the Board demonstrates that it has weighed the statutory factors involved in release determinations, its decision may not be disturbed. (Answer and Return at ¶9) Here, the respondent continues, the record shows that petitioner's COMPAS score was considered, including his favorable low risk scores; as was his sentencing minutes, institutional record, clean disciplinary record and programming. Hence, there is no evidence of pre-determination. (Answer and Return at ¶11)

Respondent asserts that the Memorandum of former Chair Evans established the written procedures required for the use of risk and needs assessment and that the same was followed by Petitioner's Board, particularly including the use of the COMPAS assessment. (Answer and Return at ¶¶ 12-13) Finally, respondent notes that this petitioner was not entitled to a TAP as the amendment to Correction Law §71-a requiring the promulgation of a TAP applies only to prisoners coming into custody on or after September 30, 2011. Thus, the Board's determination sufficiently

complied with the written procedures requirement of Executive Law §259-c(4).

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 if 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, supra*, 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, supra*, 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, supra*, 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, supra*, 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, supra*, 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 underlying 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)

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 community opposition to petitioner's release and placed considerable colloquy on the record in response to petitioner's question about the weight to be accorded to such opposition.[1] Nor can the Court find that the Board ignored the COMPAS assessment in the interview, noting, as it did, the positive results it considered.

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, supra,* 41 Misc. 3d at 1214(A) In its decision, the Board's only clear focus was on the subject

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[1]Petitioner acknowledges this "negative" factor, but asserts that the Board's failure to discuss it in the Decision implies it was not substantially considered by it. This Court has no way to assess that argument.

conviction, thus supporting the premise that the decision was pre-determined.

Such focus is corroborated by the "boilerplate" decision, which contains the statutory language and the "terse, conclusory sentences" that "[y]our institutional accomplishments and release plans are noted. Required statutory factors have been considered." *Id.*

In *Matter of Thwaites, supra,* 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 In the instant matter, 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 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.*, 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, supra*, 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, supra,* 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, supra,* 27 Misc. 3d 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) (5/11/2014) 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)

Additionally, this Court is not persuaded by respondent's arguments that the Evans

memorandum (Supporting Affirmation, Exhibit E) constituted sufficient compliance with the statutory mandate to promulgate new procedures in making parole release determinations. The 2011 amendments "replaced static, past-focused 'guidelines' with more dynamic present and future-focused risk assessment procedures." *Matter of Thwaites, supra*, 34 Misc. 3d at 699

The Court is troubled in particular by the assertion in the Evans memorandum that the standards for assessing parole determinations had not changed. The Legislature, in enacting an amendment of a statute, changing the language thereof, is deemed to have intended a material change in the law. *Morris v. New York State Department of Corrections and Community Supervision*, 40 Misc. 3d 226 (2013), *quoting, Matter of Stein*, 131 AD2d 68, 71 (2nd Dep't 1987) The assertion in the memorandum that the amendment maintained the status quo must be rejected. *Id.* at 229 Rather, the amended statute required respondent to develop written procedures that implement risk and needs principles, determine the likelihood of an inmate's success upon release, and adopt those procedures as an exercise of its rule making power. *Id.* at 230

In the instant matter, respondent, like the respondent in *Morris*, continues to argue that the Evans memorandum serve[d] as the establishment of the required procedures, despite the fact that it had neither been adopted as a formal rule, nor filed with the Secretary of State, as required by Executive Law §259-c(11).[2] Like the Court in *Morris*, this Court rejects that assertion and finds that the Evans memorandum is not and cannot serve as the required procedure, *Id.* at232, an assertion supported by the subsequent filing of proposed rule changes in December 2011.

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[2]The Court recognizes respondent's reliance on *Montane v. Evans*, 116 AD3d 197 (3rd Dep't 2014) in so doing; but notes further that few other courts have followed this ruling, now subject to review by the Court of Appeals. 23 NY 3d 903 (May 13, 2014)

Disregard of a legislative mandate through an administrative agency's inaction, as occurred in *Morris* and in the case at bar, is arbitrary, capricious and contrary to law. *Id.*, *citing, inter alia, Mayfield v. Evans*, 93 AD3d 98, 107 (1st Dep't 2012) By reason thereof, the June 25, 2013 parole hearing was unlawful. *Id.*

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.

Having so determined, the Court need not reach any of the other arguments advanced by petitioner.

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: July 18, 2014
Goshen, New York

ENTER:

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