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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE

-----X
In the Matter of the Application of
MARK MALONE,

Petitioner,

-against-

ANDREA EVANS, CHAIRMAN OF THE BOARD OF
PAROLE,

Respondent,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.
-----X

HON. VICTOR J. ALFIERI, JR., A.J.S.C.

Petitioner has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 19, 2009 which denied petitioner discretionary release on parole. Upon review, petitioner seeks a judgment reversing and vacating the March 19, 2009 determination and directing the New York State Division of Parole (hereinafter "Parole Board") to grant petitioner another parole hearing to reconsider whether petitioner should be released to parole supervision.

This Court has considered the following papers:

1. Order to Show Cause by the Honorable John K. McGuirk made returnable on January 13, 2010;
2. Affidavit in Support dated November 16, 2009;
3. Verified Petition and Exhibits A through G attached thereto;
4. Affirmation in Response dated December 1, 2009 by Sharon K. Worthy-Spiegl, Chief Assistant County Attorney;
5. Answer and Return dated January 12, 2010 by Jeane L.

To commence the statutory time period 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.

DECISION AND ORDER

Index No: 13459-2009

Strickland Smith and Exhibits 1 through 7 attached thereto.

FACTUAL AND PROCEDURAL HISTORY:

On June 27, 1983, petitioner, then 16 years of age and armed with a knife, entered into an apartment and fled when confronted by a male occupant. On July 8, 1983, petitioner, armed with a gun, entered another apartment and shot and killed one of the occupants. Petitioner, who was charged under separate indictments, pled guilty to Burglary in the Second Degree and Murder in the Second Degree. On April 19, 1994, Petitioner was sentenced to an indeterminate term of 20 years to life for his conviction of Murder in the Second Degree to run concurrently with an indeterminate term of five to 15 years for his conviction of Burglary in the Second Degree. Petitioner is currently serving these sentences at Otisville Correctional Facility.

During his years in state prison, the record reveals that petitioner has received his GED and successfully completed various counseling and treatment programs. Petitioner has also completed numerous training programs which has enabled him to work in many vocational fields. There are several progress reports and letters that have been submitted to the Court that praise petitioner's work ethic, abilities and positive outlook. In particular, there is an unsolicited letter from Robert Wurtzel, Family Services Specialist at the Osborne Association, dated March 10, 2009, who speaks very highly of petitioner and states that he believes petitioner "has

the skills to be of great benefit to his community" and that petitioner "is certainly one of the most outstanding individuals [he] has met at Otisville Correctional Facility." See, Exhibit D attached to the Petition. In addition, there are several letters of reasonable assurance, all dated in December 2008. In July 2003, petitioner got married and now has an eleven-year-old daughter. With respect to his behavioral record, while petitioner had numerous disciplinary violations initially, he has had only one Tier II disciplinary infraction since January 2002.

Since his incarceration, petitioner has appeared before the parole board four times - May 2003, June 2005, May 2007 and March 2009 - all of which resulted in the denial of parole and an additional 24-month hold each time. In his petition, petitioner sets forth the Parole Board's decision with respect to each appearance.¹ The Parole's Board's denial of parole following the May 2003 appearance cited the instant offenses and his numerous disciplinary violations as the reasons for their denial. Following the second appearance in June 2005, the Parole Board cited the instant offenses and petitioner's prior criminal record as the basis for its decision. Similarly, the instant offenses and petitioner's criminal record were the basis for his denial of parole following the May 2007 appearance, despite the Parole

¹ Although petitioner has not submitted an actual copy of the Parole Board's decisions, except for the March 2009 decision which is the subject of the within proceeding, petitioner has set forth the contents of the decisions in his Verified Petition.

Board's recognition of petitioner's positive factors - his improved disciplinary record, program accomplishments and community support.²

As set forth herein, in March 2007, petitioner made his fourth appearance before the Parole Board. The transcript of the hearing appears as Exhibit A of Petitioner's Verified Petition and Exhibit 5 of Respondent's Answer. The transcript of the hearing, including the cover page, the Parole Board's two-page decision which immediately follows the conclusion of testimony, and the reporter's certification, is a total of 14 pages. Of the remaining ten pages, three pages focus on the underlying offenses and petitioner's criminal history, three pages address some of petitioner's accomplishments, future employment and personal matters, and three pages are petitioner's own statements to the Parole Board wherein petitioner specifically asks them for "some guidance." Petitioner also asks the Parole Board if they have received Wurtzel's letter, to which Commissioner Hagler replies, "Got it." At the conclusion of petitioner's statement, Commissioner Hagler advises petitioner that they will "consider everything in the file" and "give [petitioner] a decision in a few days." Immediately following the interview, apparently without any discussion amongst the board members, the transcript states the following:

² Respondent sets forth a general denial of petitioner's allegations "except to the extent they are confirmed by the attached records." It is this Court's opinion, therefore, that petitioner's allegations regarding his prison record are essentially undisputed.

After due deliberation by the parole board panel, the following decision has been rendered: After a careful review of your record, personal interview, and deliberation, parole is denied. This panel remains concerned about the serious nature of the instant offense Murder 2nd serving 20 years to life and a concurrent 5 to 15 years for burglary 2nd. In 1983, you burglarized an apartment in Queens, armed with a knife, and fled after being confronted by a male occupant. Also in 1983, you burglarized another apartment in Queens, while armed with a handgun. You were confronted by the husband and wife who were sleeping in the apartment. You shot and killed the male victim. Your criminal history consists of a 1982 YO criminal trespass adjudication and a 1983 CPSP 3rd conviction. Your institutional accomplishments and release plans are noted. You have received one Tier II infraction since your last parole board appearance. If released at this time, there is a reasonable probability you would not live and remain at liberty without violating the law. Your release at this time is incompatible with the welfare and safety of the community.

See, Exhibit A attached to the Verified Petition and Exhibit 4 attached to Respondent's Answer. Petitioner filed an appeal of the Parole Board's decision on July 1, 2009 and petitioner has received no response. Petitioner subsequently commenced this Article 78 proceeding challenging the Parole Board's determination. In his petition, petitioner argues, inter alia, that the Parole Board usurped the function of the Legislature and the Sentencing Court and that the Parole Board's determination was arbitrary and capricious as they did not apply the relevant statutory factors. For the reasons that follow, this Court finds that petitioner has established his right to a new hearing.

DISCUSSION:

The state board of parole has "the power and duty of determining which inmates serving an indeterminate or determinate . . . sentence of imprisonment may be released on parole and when and under what conditions." Executive Law §259-c(1). Such a determination by the parole board is a discretionary one. See, Executive Law §259-i(5). However, this discretion is not without limits. For example, the Parole Board is required to consider certain enumerated factors when assessing the appropriateness of an inmate's release to parole supervision. See, Executive Law §259-i(c)(A); see also, Exhibit I attached to Petitioner's Verified Complaint; Matter of Mitchell v. NYS Div. of Parole, 58 A.D.3d 742 (2d Dept. 2009). Specifically, the Parole Board must consider all of the following factors when determining whether parole should be granted or denied: (i) 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 . . . and (v) the written statement of the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically

incapacitated. Additionally, where the sentencing court has set the minimum period of incarceration, the Parole Board must also take into account the following: (i) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court; the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. See, Executive Law §259-i(2)(c)(A), (1)(a).

Furthermore, the Parole Board's discretion is further limited by Executive Law Section 259-i(2)(c)(A) which sets forth the legal standard the Parole Board must apply in each case. Pursuant to that statute, the Parole Board, after considering and weighing the statutory factors set forth above, must also consider in each case the following: (1) whether, if released, the inmate will live and remain at liberty without violating the law; (2) whether the inmate's release will be incompatible with the welfare of society; and (3) whether release will not so deprecate the seriousness of the crime so as to undermine respect for the law. See, Executive Law §259-i(2)(c)(A) and Exhibit I attached to the Verified Petition; see also, King v. NYS Div. of Parole, 83 N.Y.2d 788

(1994).

Notwithstanding these statutory requirements, the Parole Board "is not required to give equal weight to each of the factors it considers, nor is it required to address each factor in its decision." Matter of Samuel v. Alexander, 2010 N.Y. Slip Op 520, 892 N.Y.S.2d 557 (2d Dept. 2010). However, Executive Law Section 259-i(2)(a) requires the Parole Board to inform the petitioner, in writing, of the factors and reasons for its denial and also requires that the reasons for the denial be given in detail and not in conclusory terms. See, Matter of Mitchell, 58 A.D.3d at 743. The purpose behind these requirements is twofold. First, a written decision allows for a more intelligent appellate review. Second, a written decision, if properly drafted, provides the inmate with guidance as to his future conduct so that he can eventually achieve parole release. Cappiello v. NYS Div. of Parole, 6 Misc.3d 1010A (NY Supr. Ct. 2004). Here, the inmate asked for guidance.

Applied here, a review of the March 2009 decision requires this Court to conclude that the Parole Board's decision fails to comply with Executive Law Section 259-i(2)(a). Petitioner is well aware of the crimes he committed and the sentences which he received. Yet, five of the eleven sentences that make up the Parole Board's decision is a recitation of the underlying facts of the crime with the conclusion that the Parole Board "remains concerned about the serious nature of the instant offense." The

Parole Board has not set forth any reasons as to why it remains concerned. While this Court recognizes that the nature of the crime is a factor for the Parole Board to consider, there is nothing in either the hearing transcript or the decision to establish that the Parole Board "considered" and weighed" the required factors. See, e.g., Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004) (Parole board concluded that severity of petitioner's crimes outweighed his achievements); Matter of Almeyda v. NYS Div. of Parole, 290 A.D.2d 505 (2d Dept. 2002) (Parole board concluded that serious and brutal nature of the offense and petitioner's limited insight into why he committed the homicide outweighed his positive achievements).

The Parole Board also concludes that "[i]f released at this time, there is a reasonable probability [petitioner] would not live and remain at liberty without violating the law" and that "[[his] release at this time is incompatible with the welfare and safety of the community." However, the three sentences preceding that conclusion merely recite facts pertaining to petitioner's criminal history, "institutional accomplishments and release plans," and disciplinary record. Considering petitioner's record of accomplishments, his many letters of reasonable assurances and his lack of disciplinary infractions, these factors, without further explanation, do not logically form the basis for the Parole Board's conclusion.

Given that the Parole Board's decision focuses on the nature of petitioner's offenses, this Court is also concerned that the Parole Board has essentially stepped into the shoes of the sentencing court. Although petitioner was sentenced to 20 years to life, there is evidence in the record that petitioner was, at one time, offered 15 years to life. Petitioner has now served 26 years in state prison. The Parole Board's denial of parole release for the fourth time citing primarily to the facts underlying the offenses seems to indicate that the Parole Board has its own opinion as to what the duration of petitioner's sentence should be. Such an opinion is inappropriate as the sentencing court considered the nature of the offenses when the sentence was initially imposed.

Based on the foregoing, it is hereby

ORDERED that the petition is granted; and it is further

ORDERED that the respondent's decision dated March 19, 2009 denying petitioner's release to parole supervision is annulled; and it is further

ORDERED that petitioner's request for parole is remanded to respondent, whom, within 30 days of the service of a copy of this Order with notice of entry, shall hold a new hearing before a different panel where respondent shall consider the statutorily required factors. Within 14 days after the new hearing, respondent shall issue a decision, in non-conclusory terms, on petitioner's release to parole supervision.

ENTER

Dated: Goshen, New York
March 16, 2010


HON. VICTOR J. ALFIERI, JR. A.J.S.C.

[REDACTED]