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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
**In the Matter of the Application of
MOSES McBRIDE, #95-A-1155**

Petitioner,

DECISION AND ORDER

-against-

Index No. 4483/2013

ANDREA EVANS, Chairwoman,
BOARD OF PAROLE, DEPT. OF CORRECTIONS &
COMMUNITY SUPERVISION,

Respondent.
-----X

POSNER, J., ACTING SUPREME COURT JUSTICE

THE FOLLOWING PAPERS WERE READ AND CONSIDERED ON PETITIONER'S APPLICATION pursuant to Article 78 seeking reversal of a Parole Board ("Board") decision which denied him discretionary release to parole supervision.

PAPERS NUMBERED

ORDER TO SHOW CAUSE.....	1
VERIFIED PETITION.....	7 pp.
ATTACHMENTS.....	A - C
VERIFIED ANSWER AND RETURN.....	9 pp.
EXHIBITS.....	1- 13
(EXHIBITS 1 & 3, Parts II & III; EXHIBIT 12 submitted for in camera review)	
REPLY	3 pp

UPON THE FOREGOING PAPERS, IT IS ORDERED THAT THE PETITION IS GRANTED to the extent that the Board's decision dated July 26, 2012 is annulled and the matter is remanded to the Board which shall hold a new parole release hearing before a different panel of the Board, within 30 days of the date of this decision.

Petitioner is an inmate currently incarcerated at Otisville Correctional Facility and is serving consecutive sentences of imprisonment for three convictions, based upon guilty pleas: eight and one-third to 25 years for manslaughter in the first degree imposed on February 6, 1995; five to 15 years for criminal possession of a weapon in the second degree imposed on February 6, 1995; and one and one-half to three years for attempted assault in the second degree, imposed on March 10, 1998. He was 16 and 19 years of age when he committed these crimes. He has been in state prison custody since February 1995.

Petitioner appeared before the Board for release reconsideration on July 24, 2012. This was his third appearance before the Board. After an interview the Board denied petitioner's request for release to parole supervision and ordered him held an additional 24 months. His next appearance before the Board will be in July 2014.

In rendering its decision the Board states that it gave consideration to the petitioner's rehabilitative efforts, the risk to the community, needs for successful re-integration, letters of support, and reasonable assurance and parole plans. The Board noted that petitioner's crimes caused the death of a male victim and serious physical injury to a corrections officer. The Board went on to state that parole shall not be granted as a reward for good conduct or efficient performance of duties while confined and after consideration of "specific factors" concluded that petitioner's "release at this time remains incompatible with public safety and welfare". Petitioner was advised to continue to focus on his rehabilitative efforts and positive behavior.

The petitioner administratively appealed the Board's decision on November 25, 2012. It took the Board seven months to provide him with a copy of the transcript of his parole interview. More than 120 days have elapsed between the time petitioner perfected his administrative appeal and the

filing of this Article 78 proceeding. To date no administrative appeal decision has been rendered by the Board.

Petitioner now challenges the Board's decision asserting that: it is irrational, arbitrary and capricious and reveals that the Board did not address all the factors for discretionary release; nothing raised at the parole board interview supported the decision to deny parole release; Commissioner Hernandez spoke favorably about the petitioner during the interview; the denial of parole implies that there is unspecified information not articulated by the Board which was relied upon in making the decision; the Board failed to properly weigh the statutory factors for discretionary release and failed to set forth its reasons for denying petitioner's release; and that the Board failed to follow former Chairwoman Evan's Memorandum requiring the Board to emphasize an offender's rehabilitation during the subject parole board interview. Respondent opposes the petition.

It is well-settled that parole release decisions are discretionary and if made in accordance with the statutory requirements such determinations are not subject to judicial review (Executive Law § 259-i[5]); *Matter of Secilmic v. Keane*, 225 AD2d 628 [2d Dept 1996]; *Matter of Heitman v. NYS Board of Parole*, 214 AD2d 673 [2d Dept 1995]; *Matter of Heath v. NYS Division of Parole*, 201 AD2d 732 [2d Dept 1994], *mot. lv. denied*, 84 NY2d 808 [1994]. The weight to be accorded each of the requisite factors is within the discretion of the Board and the Board need not give each factor equal weight in rendering its decision (*Matter of Goldberg v. NYS Bd. of Parole*, 103 AD3d 634 [2d Dept 2013]; *Matter of Huntley v. Evans*, 77 AD3d 945, 946 [2d Dept 2010]). The Board of Parole is not required to articulate the weight accorded each factor it relied upon in rendering its decision (*Matter of Goldberg v. NYS Bd. of Parole*, *supra* at 634 citing *Matter of Gelsomino v. NYS Bd. of Parole*, 82 AD3d 1097, 1098 [2d Dept 2011]; *Matter of Porter v. Alexander*, 63 AD3d 945 [2d Dept

2009]. Absent a convincing demonstration to the contrary, it is presumed that the Board of Parole acted properly and in accordance with statutory requirements (*People ex rel. Thomas v. Superintendent of Arthurkill Correctional Facility*, 124 AD2d 848 [2d Dept 1986], *app. denied* 69 NY2d 611 [1987]). “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 Goldberg v. NYS Bd. of Parole*, *supra* at 634 citing *Matter of Martinez v. NYS Div. of Parole*, 73 AD3d 1067,1067 [2d Dept 2010]) and the determination was thus arbitrary and capricious.

During the interview the Board asked petitioner about the details of the crimes and he acknowledged his guilt. Commissioner Hernandez noted that petitioner had numerous certificates for programs in which he has participated and completed and that he has been doing things for his rehabilitation. Petitioner described the various positive activities he has been involved in, including an anti-bullying training program. The record also contains letters of support from correction officers, who believe that petitioner would be an asset to the community.

Petitioner informed the Commissioners of his release plan to live with his brother in Brooklyn and to find work in the field of HIV and AIDS education, which he has been involved in while incarcerated and has received a certification as a peer educator.

At the hearing, the panel discussed petitioner’s COMPAS (Correctional Offender Management Profiling for Alternative Sentences) re-entry risk assessment which indicates that his risk-for arrest is low; absconding risk is low and that his overall risk of felony violence is medium. It further indicates that petitioner would need re-entry substance abuse treatment, to which he agreed.

Commissioner Hernandez then went on to state: “Certainly, you have done all you can to rehabilitate yourself, we recognize that”. The Board then rendered its decision denying petitioner parole.

While the Board discussed petitioner's positive activities and accomplishments at the hearing, it then concluded that his release was incompatible with "public safety and welfare." The Board gave no analysis as to how or why it reached this conclusion. It appears to have focused only on petitioner's past behavior without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time.

Having advised petitioner that he has done all he could to do rehabilitate himself and then having denied him parole, the Board leaves petitioner with no guidance as to what he can do to improve his chances of release at his next parole release hearing.

Further, pursuant to Executive Law §259-c(4) the Board is to utilize procedures 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 in determining which inmates may be released to parole supervision." Although the Board discussed the petitioner's COMPAS scores at the hearing, it is unclear from the cursory nature of its decision how the Board utilized its risk assessment procedures in concluding that petitioner's release is incompatible with the welfare of society at this time (Executive Law §259-c[4]).

In *Matter of King v. NYS Div of Parole*, 190 AD2d 423 (1st Dept. 1993) aff'd 83 NY2d 788 [1994], the court reversed a determination of the Parole Board and noted that the role of the Board is to determine whether, at the time of the hearing, petitioner should be released, based upon consideration of the statutory factors. While the Board was not required to specifically identify each factor it considered in rendering its decision, whether the Board followed proper guidelines and considered the proper factors must be assessed based upon the written determination in conjunction with the parole hearing transcript (See, e.g., *Matter of Siao-Pao v. Dennison*, 11 NY3d 777, 778 [2008]).

Although the respondent in its answer asserts that the Board may properly base its decision on the seriousness of the offenses and may place greater weight on the violence and brutality of the crimes, as opposed to an inmate's institutional record, here neither the Board's decision nor the transcript articulate that as the reason for its decision. Rather, the Board merely set forth its determination in conclusory terms which is in contravention of the law (*see Perfeto v. Evans*, 976 NYS2d 183, 184, 2013 NY Slip Op 08089 [2nd Dept 2013]).

The Court finds that the Board's decision denying petitioner parole under the facts and circumstances of this case is arbitrary and capricious and improper in that the Board failed to articulate a rational basis, in non-conclusory terms, as to how and why it determined that petitioner's release at this time remains incompatible with "public safety and welfare." In reaching this conclusion, the Court does not minimize the seriousness of petitioner's offenses, but recognizes that the Legislature has determined that "rehabilitation is possible and desirable" even for the most serious of crimes (*see Matter of Rios v. NYS Division of Parole*, 836 NYS2d 503, 2007 WL 846561 [Sup. Ct. Kings Co., 2007]).

Accordingly, the petition is granted to the extent that the Board's decision dated July 26, 2012 is annulled and the matter is remanded to the Board which shall hold a new parole release hearing before a different panel of the Board, within 30 days of the date of this decision.

SO ORDERED.

DATED: Poughkeepsie, NY
January 13, 2014

ENTER:



HON. JOAN S. POSNER
ACTING SUPREME COURT JUSTICE