January 2020

Decision in Art. 78 proceeding - Montane, Yotuhel (2013-06-01)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
YOTUHEL MONTANE, #11-A-3976,

Petitioner,

DECISION/ORDER

Index No. 893-13
R.J.I. No. 01-13-ST4509
Richard Mott, J.S.C.

-against-

ANDREA W. EVANS, Chairwoman, Department of Corrections and Community Supervision, Board of Parole,

Respondent.

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

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Motion Return Date: Albany County Special Term, May 17, 2013

APPEARANCES:

Petitioner: Yotuhel Montane
11-A-3976
Self Represented Petitioner
Fishkill Correctional Facility
Box 307
Beacon, NY 12508

Respondent: Eric T. Schneiderman, Esq.
Attorney General of the State of New York
The Capitol
Albany, NY 12224-0341
Brian J. O'Donnell, Esq., Assistant Attorney General, of Counsel

Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondent's April 23, 2012 decision denying him release on parole.

Petitioner is serving a negotiated sentence of 3 to 9 years following his conviction in Kings County on August 23, 2011[1].

Petitioner presumptively was eligible for parole when he met the Parole Board (see, Correction Law §805), and had already served 36 months, well in excess of his 16-to-30 month guideline, as confirmed in his Inmate Status Report. He had no disciplinary infractions, and a COMPAS evaluation determined that he had the lowest possible risk to recidivate. Nevertheless, he was denied parole. The panel stated:

> Denied - hold for 24 months, next appearance Date: 04/2014
>
> Notwithstanding the Earned Eligibility Certificate, after a review of the record and interview, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society.
>
> The Board has considered your institutional adjustment including discipline and program participation. Required statutory factors have been considered including your risk to society, rehabilitation efforts, and your needs for success and re-entry into the community, however, your release plans have been considered. More compelling, however, is the protracted period of time that you were involved as a high level drug conspirator who was part of a long term investigation for a crack cocaine delivery service. You supplied a drug organization with multiple kilos of cocaine, which was then distributed throughout Brooklyn.
>
> The Board notes your letters of support, employment letter, and program completion.
>
> All facts considered, your release at this time is not warranted.

[1]Petitioner was convicted by guilty plea of a single count of Conspiracy in the Second Degree (Penal Law §105.15) in connection with sales of cocaine. The conspiracy involved approximately 38 co-defendants. Petitioner had accumulated more than two years jail time credit at the time of his sentencing.

The Parole Board's Discretion

It is well settled that release on parole is a discretionary function of the Parole Board and that its determination will not be disturbed by the Court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 N.Y.2d 470 (2000); *Matter of King v. NYS Division of Parole*, 190 A.D.2d 423 (1st Dept. 1993) aff'd 83 N.Y.2d 788 (1994). In reviewing the Board's decision, the Court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute. *Matter of Thwaites v. New York State Board of Parole*, 34 Misc.3d 694 (2011).

The Parole Board is required to consider a number of factors in determining whether an inmate should be released on parole. Executive Law §259-I, *Matter of Malone v. Evans*, 83 A.D.3d 719 (2d Dept. 2011) and cases cited. While the Board need not expressly discuss each of these factors in its determination (see, *Matter of King v. New York State Division of Parole*, 83 N.Y.2d 788, 790 (1994)) or afford these factors equal weight (see, *Matter of Wan Zhang v. Travis*, 10 A.D.3d 828 (3d Dept. 2004)), it is the obligation of the Parole Board to give fair consideration to each of the statutory factors, and where, as here the record convincingly demonstrates that the Board in fact failed to consider the proper factors, the Court must intervene. *Matter of King v. New York Division of Parole*, 190 A.D.2d at 431.

Focusing Exclusively On The Crime

Here, the Court finds that the Board's decision focused almost, if not exclusively on Petitioner's crime. While the seriousness of the crime remains acutely relevant in

determining whether Petitioner should be released, the record in this case demonstrates conclusively that the Board failed to take into account and fairly consider any of the other relevant statutory factors. See, e.g., *Matter of Silmon v. Travis*, 95 N.Y2d at 476-7. Indeed, the Board's passing mention of matters it considered is inadequate in the circumstances of this case to demonstrate that it weighed or fairly considered the required statutory factors. See, e.g., *Matter of Rios v. New York State Division of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561 (Kings County, 2007).

Specifically, the record demonstrates that the Board inexplicably failed to consider and weigh relevant factors, which clearly supported Petitioner's release on parole. These include, but are not limited to: Petitioner's lack of disciplinary infractions, his completion of programs while incarcerated, his lack of a prior criminal record of any kind, his acceptance of responsibility for his crime, his earned eligibility certificate, his job offer, and a COMPAS evaluation revealing a low overall risk to re-offend or abscond. Despite all of these factors, the Board concluded, "There is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society." Such an arbitrary decision can be reached solely by ignoring statutorily required factors. See, e.g., *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)(' An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.") See, e.g., *Matter of Wallman v. Travis*, 18 A.D.3d 304 (1st Dept. 2005), *Matter of Coaxum v. New York State Board of Parole*, 14 Misc.3d 661 (Bronx County, 2006), *Matter of Weinstein v. Dennison*, 7 Misc.3d 1009(A), 2005 WL 856006 (New York County, 2005)

Petitioner asserts, *inter alia*, that the Parole Board did not follow applicable statutes and regulations regarding risks and needs assessment as mandated by the 2011 amendment of Executive Law §259-c(4). This Court agrees. Further, in the absence of written regulations indicating the adoption of a rule or regulation with regard to assuring an inmate an appropriate risk assessment and/or an opportunity to review it before the Board considers it (see, e.g., *Matter of Cotto v. Evans*, 2013 WL 486508 (St. Lawrence County, 2013)), the Board cannot satisfy the requirement of Executive Law §259-c(4) that Respondent adopt written rules and regulations to implement the statutory changes[2]. Accordingly, for the reasons set forth in *Matter of Morris v. New York State Department of Corrections and Community Supervision*, 963 N.Y.S.2d 852, 2013 NY Slip Op 23135 *amended* 39 Misc.3d 1213(A), 2013 WL 168901 (2013), the determination of the Parole Board is hereby vacated as unlawful, arbitrary and capricious.

The matter is remanded to the Board which, on or before July 1, 2013, shall hold a new parole hearing before a new panel consistent with this Decision and Order and issue a decision within seven days thereof, a copy of which forthwith shall be provided to the Court.

This constitutes the Decision and Order of this Court. The Court is forwarding the

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[2]Respondent's submissions argue that the 2011 amendments to Executive Law §259-c(4) "do not represent a departure from the law as it existed prior to the amendments" (Affirmation, ¶67) and that the "existing regulations already expressly incorporated risk and needs principles" (Affirmation, ¶70). Further Respondent argues that Respondent Andrea Evans's October 5, 2011 Memorandum is the "Board's interpretation of those amendments." Affirmation, ¶72. This Court rejects the assertion that the Board is in compliance with the requirements of the 2011 amendments. *Matter of Morris v. New York State Department of Corrections and Community Supervision, post.*

original Decision and Order directly to Respondent, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Claverack, New York
June ___, 2013

ENTER

RICHARD MOTT, J.S.C.

Papers Considered:

1. Order to Show Cause, dated March 4, 2013, Affidavit in Support of Order to Show Cause, dated February 6, 2013, Petition with Exhibits.
2. Answer, dated May 10, 2013, Affirmation of Brian J. O'Donnell, Esq., dated May 10, 2013 with Exhibits A-K, Affirmation of William B. Gannon, Esq., dated April 10, 2013 with Exhibits A-E.