January 2020

Decision in CPLR Article 78 proceedings - Murphy, Kevin J. (2013-07-25)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
KEVIN J. MURPHY

Petitioner,

-against-

DECISION AND ORDER

NEW YORK STATE BOARD OF
PAROLE,

Index No. 1580-13
RJI No. 01-13-ST4586

Respondent.

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

(Supreme Court, Albany County, Special Term)

APPEARANCES:

Kevin J. Murphy, 06-A-6708
Otisville Correctional Facility
P.O. Box 8
Otisville, New York 10963

Hon. Eric T. Schneiderman
Attorney General of New York State
Attorney for Respondent
(Laura A. Sprague, Assistant Attorney General,
of Counsel)
Department of Law
The Capitol
Albany, New York 12224-0341

Connolly, J.:

This is an Article 78 proceeding brought by petitioner challenging respondent's March 27, 2012 denial of parole release. Petitioner was convicted of Reckless Manslaughter in the Second Degree and was sentenced to an indeterminate term of 5 to15 years.

In its decision denying Petitioner parole release, the Board stated:

Denied - Hold for 24 months, Next appearance 03/2014

Conditions of Release/ Staff Instructions/ Reasons for Denial:

Notwithstanding the EEC, 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 of successful re-entry into the community. Your release plans have also been considered. More compelling, however, is your callous disregard for the life of the victim, who left behind a 3-year-old daughter and a family that has suffered trauma, stress and sadness as a result of this senseless loss of life. There is also additional community opposition to your release. You did not appear to be completely forthcoming during your interview with this panel.

The Board notes your numerous letters of support, letter from your former attorney and program completions. The Board also notes your educational accomplishments and your service to this country. All facts considered, your release at this time is not appropriate.

While the Appeals Unit ultimately affirmed the Board's decision on March 26, 2013, it did not file a determination within four months of its receipt of a supplemental appeal of July 30, 2012. Pursuant to 9 NYCRR §8006.4(c), the petitioner may deem his administrative remedy to be exhausted and seek judicial review of the underlying determination (*see Graham v New York State Division of Parole*, 269 AD2d 628 [3d Dept 2000], *lv denied* 95 NY2d 753 [2000]). This article 78 proceeding was filed on March 15, 2013.

Petitioner asserts that the Board has not complied with the 2011 amendments to the parole law that required the Board to establish written procedures for its use in making parole decisions as required by law (Exec. Law §259-c(4), and, accordingly, he is entitled to release to parole or, in the

alternative, a de novo hearing wherein such written procedures are utilized. Petitioner also asserts that the Parole Board actions were arbitrary, capricious, or irrational, in that the Board (i) did not consider his Earned Eligibility Certificate; (ii) did not properly consider his Risk and Needs Assessment; (iii) solely focused on the seriousness of the instant offense; (iv) did not consider the statutory factors; (v) disregarded the imprisonment guidelines; (vi) considered erroneous information; (vii) improperly considered community opposition and did not consider the statutory factors; (viii) pre-determined not to release him to parole; (ix) did not consider petitioner's institutional history and achievements; (x) did not provide a sufficiently detailed determination; and, (xi) re-sentenced petitioner.

Petitioner initially asserts that the Board has failed to comply with the amendments to the Executive Law as he asserts they have failed to establish "written procedures" which "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board" and accordingly, petitioner's immediate release should be compelled, or, in the alternative, he should be given a *de novo* hearing where such newly issued procedures are utilized. Petitioner asserts that the Board has not adopted the written procedures mandated and accordingly, such procedures were not applied by the panel (including the required risk assessment) (Petition, pg 12). Petitioner asserts, therefore that the Court should vacate and amend the Board's determination and order petitioner immediately released or in the alternative order a de novo hearing within 30 days and direct that the written procedures be adopted and a new hearing conducted in accordance with those procedures.

To the extent petitioner is seeking mandamus to compel, mandamus to compel is appropriate only where the right to relief is clear and the action sought to be compelled is an act commanded to

be performed by law involving no exercise of discretion. (*Matter of Korn v. Gulotta*, 72 NY2d 363 [1988]). Mandamus is addressed to the discretion of the Court and a denial of such relief will not be disturbed without a showing of an abuse of discretion. (*County of Albany v. Connors*, 300 AD2d 902 [3d Dept. 2002]).

Executive Law §259-c (4) was amended (*see* L 2011 ch 62, Part C, Subpart A, § 38-b) and requires the Board to

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs 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.

In addition, Executive Law §259-i (2)(c) was amended to list all of the factors the Board is required to consider in making parole release determinations in the same provision. Such amendment did not add new factors for consideration but list all factors in the same paragraph.

In a memorandum dated October 5, 2011, respondent addressed the amendments to the Executive Law (Respondents Exhibit P) providing written guidance concerning the 2011 amendments. Such memo provides, *inter alia*, that the

> members of the Board have been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ("TAP"). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. ...Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. ....
> Additionally, such memo provides that
>
> ... the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. ... therefore, in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation

and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

As petitioner was committed to the custody of the department in 2006, a transition accountability plan ("TAP") has not been prepared for petitioner (see Corrections Law §71-a[1]), however, the record includes a copy of the inmate status report. Further, a COMPAS Risk and Needs Assessment instrument was prepared for petitioner and its receipt noted during petitioner's interview by the Board. Petitioner acknowledges this, though he argues that the Board failed to give full consideration to such Risk and Needs Assessment.[2]

In this case, petitioner has failed to demonstrate with legally binding authority that respondent's present written procedures are insufficient nor, that the absence of additional written procedures and/or administrative regulations merit petitioner's entitlement to immediate release to

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[1]Corrections Law §71-a became effective on September 30, 2011 and provides as follows:

Upon admission of an inmate committed to the custody of the department under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision. The commissioner may consult with the office of mental health, the office of alcoholism and substance abuse services, the board of parole, the department of health, and other appropriate agencies in the development of transitional case management plans.

[2]The record reflects that the Board considered, *inter alia*, through its review of the inmate status report, COMPAS Risk and Needs Assessment, petitioner's institutional records including his institutional achievements, disciplinary record and release plans, and his interview before the Board, the steps petitioner had taken toward rehabilitation and the likelihood of his success once released to parole supervision.

parole or a *de novo* hearing. Accordingly, petitioner's requested relief, seeking immediate release to parole and/or a *de novo* hearing on such basis is without merit.

Based upon the record, however, the Court finds, on other grounds, that the petitioner is entitled to a *de novo* hearing. Petitioner asserts that the Board relied upon erroneous information and failed to provide a detailed determination, as they questioned petitioner about whether he faced perjury charges and concerning contraband allegedly found at his apartment on the date of the incident. The transcript demonstrates that petitioner denied facing perjury charges and denied ownership or possession of any contraband. The record before the Court fails to demonstrate that petitioner faced perjury charges nor that he faced charges concerning contraband in connection with the incident. The Board, in its determination however, noted that petitioner did not appear to be completely forthcoming during his interview with the Board, though it did not provide any detail concerning what portion of the interview demonstrated such assertion. Where the Board fails to consider the proper standards, the determination must be annulled as arbitrary and the matter remitted to the Board for a *de novo* hearing (*Matter of King v. New York State Div. of Parole*, 190 A.D.2d 423 [1st Dept 1993]; *see generally, Plevy v. Travis*, 17 A.D.3d 879 [3d Dept 2005]).

Additionally, petitioner contends that the Board was unaware that he had been "granted outside clearance for participation in a temporary release program while at Greenhaven Correctional Facility" and referenced his Inmate Status Report which did not note that petitioner had participated in work release. While the Court notes that it is not clear from the petition whether petitioner actually participated in work release, in response respondent appears to acknowledge that the record before the Board did not contain such information and argues that it was for petitioner to raise such issue. In the event the petitioner participated in work release, the Board is required to consider such

information (*see* Executive Law 259-i [2][c]; *see also Santos v. New York State Div. of Parole*, 234 A.D.2d 840 [3d Dept 1996]). As respondent has failed to clarify whether or not such contention by petitioner is accurate, such matter must be remitted for a *de novo* hearing.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by order, is sealing all records submitted for in camera review.

Therefore, it is hereby

ORDERED, that the petition is granted solely to the extent that this proceeding is remitted to respondent for a *de novo* parole board hearing, before a different panel within thirty (30) days of the date of this Decision and Order; and it is further

ORDERED, that the confidential records submitted to the Court for *in camera* review are sealed.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order and confidential records are being returned to the attorney for the respondent. The below referenced original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry.**

SO ORDERED.
ENTER.

Dated: July 21, 2013
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated March 28, 2013; Verified Petition dated March 5, 2013 with accompanying exhibits A-M;
2. Answer dated April 8, 2013; Affirmation of L. Sprague, Esq. dated April 8, 2013 with accompanying exhibits A-R;
3. Reply dated May 19, 2013 with accompanying exhibits A-B.