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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

ERIC BENSON,

Petitioner

- against -

NEW YORK STATE BOARD OF PAROLE, Tina
Stanford, Chairwoman,

Respondent.

DECISION, ORDER, and
JUDGMENT

Index No.: 978/2019

FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding Petitioner's application pursuant to CPLR Article 78 for judicial review of the denial of his release to parole supervision:

	Papers Numbered
Notice of Petition	1
Verified Petition	2
Memorandum of Law	3
Exhibits (A-L)	4-15
Answer and Return	16
Exhibits (1-13)	17-29
Reply	30

Petitioner commenced this proceeding seeking an order (1) annulling the determination of the Board of Parole ("the Board") dated September 12, 2018 which denied Petitioner parole release and (2) remitting the matter to the Board for a *de novo* parole release hearing. For the reasons stated herein, the Petition is granted.

On March 16, 1994, Petitioner was sentenced to 25 years to life imprisonment for the murder of Duane Johnson in Albany, New York, on February 13, 1993. Hours prior to the murder, Petitioner and his co-defendant, Michael Lopez, got into a fight with the victim and his friends at a bar. Petitioner and his co-defendant left the bar, armed themselves, and returned to the bar to find that the victim and his friends had left. A few hours later, Petitioner, riding in a cab with his co-defendant, saw the victim standing on a street corner. Petitioner and his co-defendant got out of the cab and shot Mr. Johnson numerous times, causing his death.

Petitioner's first appearance before the Parole Board was in April of 2017. Parole was denied at that time and reconsideration for release was deferred to December of 2017. On that occasion, the Board granted parole with an open date for release in February of 2018. However, that release decision was subsequently rescinded after the Board belatedly received correspondence from the victim's family, the Albany County District Attorney, and the sentencing court that objected to Petitioner's release. Petitioner appealed the rescission of parole but the Board's determination was affirmed by the Appellate Division, Third Department [*Benson v. New York State Board of Parole*, 176 AD3d 1548 (3d Dept. 2019)].

Petitioner again appeared before the Board on September 12, 2018. Following his interview, the Board denied Petitioner discretionary release and deferred reconsideration for another 24 months. Petitioner timely perfected an administrative appeal. On or about April 15, 2019, the appeals unit affirmed the Board's denial of parole. The verified petition now before this Court raises but a single argument: that the Board's decision violated 9 NYCRR §8002.2(a) by failing to provide an individualized reason for its departure from Petitioner's COMPAS scores.

DISCUSSION

The Parole Board's release decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review [see Executive Law §259-i[2][c][A]; see also *Matter of Banks v. Stanford*, 159 AD3d 134 (2d Dept. 2018)]. "Absent a convincing demonstration to the contrary, the [Parole] Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only where there is a showing of irrationality bordering on impropriety" [*Matter of Thomches v. Evans*, 108 AD3d 724, 724 (2d Dept. 2013), *lv app denied* 22 NY3d 865 (2014)].

As relevant here, 9 NYCRR §8002.2(a) provides that:

[i]n making a release determination, the board shall be guided by the risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, Department Risks and Needs Assessment). *If a board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure* [emphasis added].

Petitioner's COMPAS assessment ranked him as posing a low risk for felony violence, arrest, and absconding [see Verified Petition, Exs. D & G]. In spite of these low scores regarding risk of re-offense, the Board found in its September 12, 2018 decision that:

There is a reasonable probability you would not live at liberty without again violating the law. Further, your release at this time is incompatible with the welfare and safety of the community ... The panel finds you will not live and remain at liberty without violating the law.

Respondents argue that the Board's conclusion that Petitioner would "not live and remain at liberty without again violating the law" is not a departure from his low COMPAS scores on the risk of re-offense scale. Respondents assert that while COMPAS assesses an individual's risks

relative to other inmates and parolees, the Board evaluates a parole candidate's risk of re-offending against the risk of criminality posed by all members of the general public¹. This argument is unpersuasive. Under Respondents' formulation, a parole candidate's risk of re-offending (even if low, as here) will invariably compare unfavorably with the risk of re-offending posed by members of the general public. This argument, taken to its logical conclusion, would render the COMPAS assessment essentially irrelevant to the Board's decision-making process and runs afoul of the plain language of the regulation².

Based upon the foregoing, the Court finds that the Board's determination that Petitioner would not live and remain at liberty without violating the law is a departure from a scale within his COMPAS assessment. Thus, 9 NYCRR §8002.2(a) required the Board to specify the scale from which it departed and provide an individualized reason for such departure. A review of the Board's September 12, 2018 decision demonstrates that the Board failed to follow these requirements.

Here, the record before the Court clearly demonstrates that the Board failed to comply with 9 NYCRR §8002.2(a). Accordingly, because the Board's determination was affected by an error of law [CPLR §7803(3)], the September 12, 2018 determination is annulled, and Petitioner is entitled to a *de novo* interview [see *Matter of Comfort v. Board of Parole*, Sup. Ct., Dutchess County, December 21, 2018, Acker, J., Index Number 1445/2018; see also *Matter of Robinson v. Stanford*, Sup. Ct., Dutchess County, March 13, 2019, Rosa, J., Index Number 2392/2018].

The Court is cognizant of the tragic and senseless loss of life brought about by Petitioner's horrific actions over 27 years ago, and of the suffering the victim's family has endured. It is not

¹ See Answer and Return, ¶ 10 ("An applicant for parole can have a low probability of offending relative to other inmates and parolees, but still pose an unacceptable risk in relation to the entire population").

² See 9 NYCRR §8002.2(a) ("... the board *shall be guided* by risk and needs principles, including the inmate's ... scores generated by a periodically-validated risk assessment instrument ..." [emphasis added]).

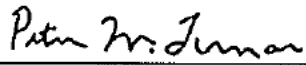
the Court's intention in rendering this decision to minimize either the Petitioner's actions or the suffering of the victim's family. However, it remains this Court's responsibility to ensure that Petitioner's application for parole release be appropriately evaluated according to all applicable laws and regulations [*Matter of Comfort, supra*]. It is therefore

ORDERED and ADJUDGED, that the Petition is granted and the September 12, 2018 determination denying parole release is annulled; and it is further

ORDERED and ADJUDGED, that the matter is remitted to Respondent for a *de novo* parole release interview, which shall be held no later than sixty (60) days from the date of this Decision, Order, and Judgment.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

Dated: April 27, 2020
Poughkeepsie, New York



Hon. Peter M. Forman, A.J.S.C.

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