December 2020

Decision in CPLR Article 78 proceedings - Hill, George (2020-10-23)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

---------- X Index No.: 100121/2020

GEORGE HILL,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner, George Hill (hereinafter "petitioner" or "Mr. Hill"), seeks an order and judgment (i) vacating a January 22, 2019 determination by the New York State Board of Parole (hereinafter "respondent" or "Board") denying petitioner release on parole, (ii) ordering an immediate *de novo* parole release interview before a panel of Commissioners not involved petitioner's prior interviews, and prior to such interview, directing the Board to produce all documents submitted to, or considered by it, in connection with petitioner's application for parole, (iii) issuing an order requiring the Board to either grant Mr. Hill parole or, if denied, to specify each and every scale in the COMPAS[1] assessment from which it is departing and provide "individualized reasons" for doing so as required by 9 NYCRR 8002.2.

Respondent opposes the petition on the grounds that petitioner failed to exhaust his administrative remedies by administratively appealing the Board's alleged failure to provide him with certain documents prior to his parole interview, and that its determination was not arbitrary or capricious as the Board considered all relevant statutory factors in denying petitioner parole

[1] COMPAS stands for Correctional Offender Management Profiling for Alternative Sanction.

release. While this proceeding was pending, petitioner was again denied parole release, and the Board cross moves to dismiss the petition as moot, and petitioner opposes the cross motion.

BACKGROUND

On November 16, 1991, Mr. Hill, who was then 19 years old, shot a police officer multiple times causing the officer serious and permanent injuries. Mr. Hill voluntarily surrendered to the police four days after the incident. After a jury trial, petitioner was convicted of various crimes, including attempted murder in the first degree for which he was sentenced to 20 years to life in prison. Mr. Hill is currently serving this term at Woodbourne Correctional Facility and has been incarcerated for more than 28 years. Before he was convicted, Mr. Hill had been adjudicated as a youthful offender for Criminal Possession of a Weapon and sentenced to five years of probation.

During his incarceration, Mr. Hill earned an Associate, Bachelor and Master degrees and has served as a mentor and role model to other incarcerated people and has displayed remorse for his crime. Hill also has been involved in mandatory and voluntary programming and became a certified living skills counselor aide, and applied for, and was selected to be, an Inmate Program Associate. Before his transfer to a medium security prison, Mr. Hill was a Clerk in the law library at Sing Sing Correctional facility and was promoted to general clerk. Mr. Hill received a low COMPAS risk level except for a history of violence for which he scored a medium. As for Mr. Hill's disciplinary record, he has received four disciplinary infractions since 2007, with the last received in 2014. Mr. Hill's recommended Supervision Status Level is low risk, which is the least intensive level of supervision and management that an individual can receive upon release, and reflects that he poses a low risk of future felony violence, arrest, and absconding. The record

also indicates that Mr. Hill has supportive network of family and friends, including a brother who is a retired New York City Correctional Officer.

On January 5, 2019, New York Daily News published an article, titled "*Retired cop wounded by gunman in 1991 worried shooter will be paroled*" identifying two Parole Commissioners who were quoted as agreeing that Mr. Hill should be given parole. Before his parole interview, Mr. Hill had submitted written requests pursuant to 9 NYCRR 8000.5 for a copy of his complete file but the received file omitted opposition letters to his release. On January 9, 2019, Mr. Hill appeared for his sixth Parole Board hearing, which included the two commissioners quoted in the New York Daily News article. The Board was provided with the Parole Board report, a Parole Packet prepared by Mr. Hill, and Mr. Hill's favorable COMPAS risk assessment.

On January 22, 2019, the Board denied petitioner release on parole, stating, inter alia, that:

> After a review of the record, interview and deliberation…there is a reasonable probability that [Mr. Hill] would not live and remain at liberty without again violating the law and [Mr. Hill's] release would be incompatible with the welfare of society, and would so deprecate the serious nature of the crime as to undermine respect for the law…[Mr. Hill's] serious instant offense involved [Mr. Hill's] action of discharging a fire arm numerous times striking the victim, a NYC Police Office in the head, torso and extremities. The officer sustained serious physical injuries... at the time, you were on probation for a prior firearm related offense.
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> The instant offense represents your first NYS term of incarceration and your criminal history reflects only probation. As to your institutional record the panel makes note of [Mr. Hill's] accomplishments…we have reviewed your case plan and your risk and needs assessment which indicates a mixed score. [Mr. Hill's] disciplinary record reflects multiple sanctions. The last infraction was in 2014. Continue to remain discipline free. [Mr. Hill's] sentencing minutes have been considered. There is significant opposition to [his] parole. Notice is made of [Mr. Hill's] excellent parole packets, letters of support and reasonable assurance…however discretionary release shall not be granted merely as a reward

> for good conduct or efficient performance while incarcerated…the instant offense was violent, heinous and shows a total disregard for human life.[2]

Mr. Hill received a 15-month hold.

Mr. Hill filed an appeal with the Parole Board Appeals Unit on May 29, 2019. In a decision dated October 18, 2019, the Appeals Unit affirmed the January 2019 decision and rejected petitioner's arguments that the Board's decision was arbitrary and capricious and in direct violation of law, and that the Board failed to provide Mr. Hill with a meaningful opportunity for parole, and violated his right to due process under the New York State Constitution.

In this proceeding, petitioner seeks to vacate the Board's denial of parole release and seeks an immediate *de novo* hearing before a new panel of commissioners, excluding those who had previously been parties to any of Mr. Hill's six Parole Board hearings. Petitioner argues that the Board's denial of Mr. Hill's application for parole was arbitrary and capricious, irrational and improper, and in direct violation of the Board's own regulations and state laws. Specifically, petitioner argues that Board considered only the nature of the crime and the opposition letters, which were not provided to him, and thus failed to comply with Section 259-c Executive Law, as amended in 2011, requiring a forward-looking, individualized assessment of parole candidates. Additionally, petitioner argues the Board failed to provide an adequate explanation of its analysis of the COMPAS assessment and, in particular, failed to indicate the reasons for denying parole release despite Hill's low Risks and Needs Assessment's scores and to "provide an

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[2] On January 18, 2019, prior to the Board's written determination of Mr. Hill's application, the victim, Police Officer Freitas, sent a tweet that Mr. Hill's parole was denied. In footnote 3 of its opposition brief, respondent asserts that the transcript of the January 9, 2019 interview shows that "upon due deliberation," the Board made a verbal determination following the interview on January 9, 2019.

individualized reason for this departure," as required under 9 NYCRR 8002.2, as amended in 2017.

Petitioner also asserts that the Board abused its discretion as it did not give appropriate consideration to the factors enumerated in Section 259-i of the Executive Law, and by basing the denial on "significant opposition" without providing Mr. Hill with documents supporting this assertion, despite Mr. Hill's request for his complete parole record.

Respondent opposes the petition, on various grounds, including that petitioner has not exhausted his administrative remedies since petitioner was offered an administrative appellate review after respondent conceded that the failure to provide Mr. Hill with the "significant opposition" referred to in the Board's determination was a procedural error warranting review. As for the merits of the petition, the respondent argues that petitioner has not met his burden of showing that the Board's determination was "arbitrary and capricious" or "irrational bordering on impropriety," citing *Matter of Silmon v. New York Board of Parole*, 95 N.Y.2d 470, 476 (2000). In this connection, respondent asserts that the Board gave meaningful consideration to the relevant factors under Section 259-i, and the weight accorded to these factors is discretionary and not subject to judicial review. In particular, the respondent argues that the Board has discretion to place more emphasis on the seriousness of the crime as opposed to positive factors such as remorse when, as here, to do otherwise would so deprecate the seriousness of the crime as to undermine respect for law, citing *Matter of Kozlowski v. New York State Board of Parole*, 108 A.D.3d 435, 436 (1st Dept 2013). The Board also argues that it complied with the Executive Law section 259-c, as amended, and the 2017 amendment to 9 NYCRR 8002.2, as it used the COMPAS tool in its assessment, and that amendments do not change the overall requirements under the Executive Law.

While this proceeding was pending, Mr. Hill appeared before the Board for a seventh time on April 14, 2020 and was again denied parole. In its determination the Board stated:

> The Board…commends [Mr. Hill's] personal growth and productive use of time, however, discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined…A review of [Mr. Hill's] records and interview … that if released at this time there is a reasonable probability that [Mr. Hill] would not live and remain at liberty without again violating the law and [Mr. Hill's] release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. Required statutory factors have been considered, together with [Mr. Hill's] institutional adjustment including discipline and program participation, [Mr. Hill's] risk and needs assessment and [Mr. Hill's] needs for successful re-entry into the community.
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> During the interview [Mr. Hill] conveyed that [he was] hiding from the officer and though he could not see [Mr. Hill], [Mr. Hill] shot at him anyway 8 times…. [Mr. Hill] possessed a "catch me if you can" attitude. [Mr. Hill's] reckless behavior not only cause a police officer serious injury but ended his career.
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> The Panel acknowledges [Mr. Hill's] parole packet, certificates of achievement, letters of support and program completions. Also noted is the official opposition to [Mr. Hill's] release.

On the July 9, 2020 return date of the petition, respondent sought an adjournment to move to dismiss on mootness grounds based on the Mr. Hill's April 2020 appearance before the Board and the denial of his parole application. By interim order dated July 9, 2020, the court granted respondent an adjournment to make the dismissal motion and provided petitioner with an opportunity to oppose the motion.

In its cross motion to dismiss, respondent argues that Mr. Hill's reappearance before the Board renders the prior parole decision moot as once a new final decision of parole is issued, a parole applicant cannot be granted relief based on a prior allegedly improper parole denial, citing *Matter of Siao-Pao v. Travis*, 5 A.D.3d 150, 150 (1st Dept), *lv denied* 3 N.Y.3d 603 (2004) (appeal of Article 78 denial was moot "because petitioner appeared before the Parole Board in

2003 and received another hearing, the only relief that petitioner could have received in the event that this Court found merit in his current appeal concerning his denial of parole in 2001").

Additionally, respondent argues that the issue of the failure to disclose documents regarding opposition to petitioner's parole release does not affect the mootness of the petition.[3] Specifically, respondent asserts that the relief sought in the petition is not a new administrative appeal due to the procedural error of failing to provide petitioner with evidence of opposition to his release but, rather, a new interview, and that petitioner received such an interview when he reappeared before the Board for the seventh time in April 2020.

In opposition to the cross motion, petitioner argues that this proceeding qualifies for an exception to the mootness doctrine as it presents substantial questions that are certain to be repeated and to evade review, citing *McLaurin v. New York State Parole Board*, 27 A.D.3d 565, 566 (2d Dept), *lv denied* 7 N.Y.3d 708 (2006). In particular, petitioner argues that this matter falls within the exception of the mootness doctrine as Mr. Hill is challenging the Board's repeated failures to comply with substantial and non-discretionary rules, by denying him parole release based solely on the seriousness of the offense, and its departure from the positive COMPAS assessment without providing individualized reasons for its departure. In addition, petitioner asserts that respondent again failed to provide petitioner with opposition letters to his release prior to the interview.

[3]In a footnote to its memorandum in support of its cross motion, respondent indicates that in response the court's directive, respondent attempted, but was unable, to confirm its belief that certain opposition letters were disclosed to petitioner before the April 2020 interview. However, as indicated below, in reply, respondent acknowledged that petitioner did not receive opposition letters and at oral argument, respondent did not offer further clarification of the issue.

In support of his position, petitioner submits the transcript of the April 14, 2020 parole interview and determination and argues that it shows "substantial and recurring issues" and that the April 2020 interview was a "re-run" of the prior interview.

In reply, while respondent states that it "believes that petitioner did not receive community opposition letters prior to the April 2020 interview," it argues that the failure to provide such opposition does not present a substantial issue that would otherwise evade review, so as to qualify as an exception to the mootness doctrine, since such failure is a procedural error that must be addressed by administrative appeal of the April 14, 2020 determination.

DISCUSSION

Executive Law, Section 259–i(2)(c)(A) provides that:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect of the law.

In making its determination as to parole release, the provision requires that Board to consider the following eight statutory factors:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; ...; (iii) release plans including community resources, employment, education and training and support services available to the inmate ...; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated ...; (vii) 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 presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

Executive Law § 259-i [2] [c] [A].

In addition, to the statutory factors under Executive Law § 259-i, under Executive Law § 259-c (4),[4] the Board is required to consider an applicant's COMPAS Risk and Needs Assessment Instrument. *See generally Perea v. Stanford,* 149 A.D.3d 1392, 1393 (3d Dept 2017); *see also,* 9 NYCRR 8002.2(a).

A petitioner challenging a parole determination has the burden of demonstrating that the determination was "arbitrary and capricious" or "irrational bordering on impropriety." *Matter of Silmon v. New York Board of Parole*, 95 N.Y.2d at 476. In this connection, it well settled that the Parole Board has wide discretion in determining whether to grant or deny parole release and how much weight to give to the eight statutory factors. *Phillips v. Dennison,* 41 A.D.3d 17 (1st Dept*), lv dismissed* 9 N.Y.3d 956 (2007). Thus, "[i]t is not necessary that the Board's decision specifically refer to each and every one of [the] factors …or that the board give each of them equal weight." *King v. New York State Div. of Parole*, 190 A.D.2d 423, 431 (1st Dept), *aff'd*, 83 N.Y.3d 788 (1994). At the same time, however, "it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene." *Id.* Moreover, while "the seriousness of the underlying offense remains acutely relevant in determining whether [a] petitioner should be released on parole," a petition to annul a determination should be granted where the record

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[4] Under Executive Law § 259-c, as amended in 2011, the Board is required to establish "written procedure for use in making parole decisions as required by law…[which]… 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." In this connection, the Board has adopted a COMPAS risk assessment tool "which delves into, *inter alia*, an inmate's criminal record, disciplinary history, support network, use of illegal substances, and readiness for employment, to predict risk, and which includes a questionnaire to be completed by the inmate." *Kennedy v. New York State Board of Parole*, 117 A.D.3d 948, 949 (2d Dept 2014).

shows that the Board did not consider other relevant statutory factors. *Malone v.* Evans, 83 A.D.3d 719, 719 (2d Dept 2011) (internal citations omitted).

Furthermore, it is a procedural error for the Parole Board to refuse to provide a parole applicant with access to documents considered by the Board. *See Matter of Clark v. New York State Bd. of Parole*, 166 A.D.3d 531, 531-532 (1st Dept. 2018)(holding that the court below "correctly determined that the administrative appeal of the Board's denial of parole was marred by procedural error" based on the Board's failure to provide petitioner with access to letters in opposition to her release considered in connection with petitioner's parole application).

The threshold determination of whether this proceeding is subject to dismissal as moot, which involves an analysis of whether this matter presents substantial issues that are likely to recur, is intertwined with that of whether the Board's determination should be annulled as arbitrary and capricious. *See Lovell v. New York State Div. of Parole*, 40 A.D.3d 1166, 1167 (3d Dept. 2006) (although petitioner's reappearance before the parole board during the pendency of the appeal "would normally have necessitated dismissal of the current appeal as moot, an exception to the mootness doctrine is presented herein inasmuch as a substantial issue is involved, i.e., the failure to comply with the provisions of Executive Law § 259-i, which continues to evade review"); *McLaurin v. New York State. Bd. of Parole*, 27 A.D.3d at 566 (finding mootness doctrine did not apply where petitioner had another parole hearing as the record shows that the parole board still did not have or consider resentencing minutes).

Here, the court finds that the Board's January 2019 and April 2020 decisions denying petitioner parole release support a finding that substantial issues exist that will continue to evade review as the Board's decisions denying parole present issues as to whether the Board's denials were based on the nature and seriousness of the underlying crime committed by Mr. Hill when

he was 19 years old, without considering other factors under Executive Law § 259-i. Thus, while both determinations refer to petitioner's successful institutional record, including his obtaining three advanced degrees, and his excellent parole packet, and state that the factors under Executive Law § 259-i were considered, in each instance the Board concludes, without explanation that "there is a reasonable probability that [Mr. Hill] would not live … without again violating the law and [Mr. Hill's] release would be incompatible with the welfare of society."

The seriousness of Mr. Hill's crime and the permanent and tragic effects it had on the officer's life are clear, and the decision reflects the Board's careful consideration of these factors. The Board's decision, however, does not reflect the basis of its finding that Mr. Hill poses a danger to society. The Board failed to articulate the reasons for this determination with respect to Mr. Hill's low COMPAS Risks and Needs Assessment scores or to "provide an individualized reason for this departure," in accordance with 9 NYCRR 8002.2.[5] The Board's failure to consider this assessment is relevant in light of petitioner's remorse, accomplishments in prison, his skills, release plans and positive scores on his COMPAS Risk Assessment. Accordingly, the court concludes that the Board's determination was arbitrary and capricious and irrational

[5] Section 8002.2 (a), provides:

> In making a release determination, the Board shall be guided by 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 Risk 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. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the Board may consider these as well.

bordering on impropriety. *Matter of Rivera v. Stanford*, 172 A.D.3d 872 (2d Dept 2019)(holding that matter should be remitted to parole board for new hearing "where the record indicated that in light of all of the relevant factors, including, but not limited to, the petitioner's understanding of and remorse for his crimes, his significant accomplishments, his leadership, and demonstrated maturity, notwithstanding the seriousness of the underlying offenses, the Parole Board's determination to deny the petitioner release on parole evinced irrationality bordering on impropriety")(internal citations and quotation omitted); *Marino v. Travis*, 13 A.D.3d 453, 455 (2d Dept 2004)(finding that the Parole Board's determination was "irrational bordering on impropriety" where petitioner appeared several times before the Board and his release was denied for the same reasons, without new or additional relevant evidence or any other submission in support of its determination).

The court's conclusion is supported by the submissions before the Board and its decision which lacks a foundation for its determination that Mr. Hill, at present, poses a danger to society, and demonstrates that the Board, while referring to the statutory factors, did not consider all statutory factors, but focused solely on the underlying crime. *King* v. *New York State Div. of Parole*, 190 A.D.2d at 423 (finding that the "record clearly reveals that denial of parole was a result of the Board's failure to weigh all of the considerations and there is a strong indication that the denial was a foregone conclusion" given the lack of new evidence or reasoning in the subsequent parole denials). In reaching this conclusion, as discussed above, the seriousness of the crime and permanent effects on the life of the officer were proper and significant factors that were considered. However, the nature and seriousness of the crime cannot exclude a fair consideration of the other legally mandated factors.

As for the opposition letters, before the April 2020 interview, the Board apparently again failed to provide petitioner with these letters in violation of 9 NYCRR 8000.5(c)(1)(i),[6] which opposition letters were considered by the Board in both the January 2019 and April 2020 determinations denying petitioner's parole release. Under these circumstances, this matter must be remanded for a new hearing before a new Parole Board, at which the statutory factors under the Executive Law shall be considered and petitioner's positive COMPAS assessment taken into account, and before such hearing, petitioner shall be provided in accordance this decision, the parole case record including opposition letters to his parole release in accordance with the procedures in 9 NYCRR 8000.5(c)(2)(i)(a).[7] *See McLaurin v. N.Y.S. Bd. of Parole*, 27 A.D.3d at 566 (directing that the Board hold a de novo hearing and obtain and consider resentencing minutes that were obtained prior to its parole determinations); *see Standley v. New York State Div. of Parole*, 34 A.D.3d 1169, 1170-1171 (3d Dept 2006)(where record established that Board "repeatedly failed to consider the sentencing minutes and recommendations of the sentencing court," and when petitioner reappeared during the pendency of the appeal, the matter must be remitted to the Board for a *de novo* hearing at which sentencing minutes and recommendations of sentencing would be considered).

Finally, while respondent's failure to provide petitioner with the letters of opposition to his release is a procedural error, which would generally not require a new interview but remand for administrative appellate review (*Matter of Clark*, 166 A.D.3d at 532), under the circumstances here, where a new parole interview is being ordered and in view of respondent's

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[6] 9 NYCRR 8000.5(c)(1)(i) provides that and "[a]n inmate, a release or counsel for either may have access to information contained in the parole case record prior to a scheduled appearance before the board".

[7] 9 NYCRR 8000.5(c)(2)(i)(a) limits access to case records under certain enumerated circumstances.

repeated failure to provide such opposition letters, exhaustion of administrative remedies would be futile, and the correct remedy is to direct the Board to provide petitioner with the opposition letters prior to his new parole interview.

CONCLUSION

In view of the above, it is

ORDERED that the cross motion to dismiss on mootness grounds is denied; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of directing that petitioner be provided with a new parole interview in accordance with this decision before a new Board within 30 days of e-filing the decision, order, and judgment, and it is further

ORDERED and ADJUDGED that within ten days of efiling of this order, petitioner shall be provided with the parole case record, including any letters in opposition to petitioner's parole release in in accordance with the procedures in 9 NYCRR 8000.5(c)(2)(i)(a).

DATED: October 13, 2020

J.S.C.

HON. JOAN A. MADDEN
J.S.C