September 2021

Decision in Art. 78 proceeding - Blumenberg, Robert (2015-02-03)

Matter of Blumenberg v New York State Div. of Parole
2015 NY Slip Op 30431(U)
February 3, 2015
Supreme Court, Albany County
Docket Number: 5418-14
Judge: Jr., George B. Ceresia

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ROBERT BLUMENBERG,

Petitioner,

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-14-ST6232 Index No. 5418 -14

Appearances: Robert Blumenberg
Inmate No. 13-A-0702
Petitioner, Pro Se
Gowanda Correctional Facility
South Road
P.O. Box 311
Gowanda, NY 14070-0311

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Gowanda Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent

dated January 7, 2014 to deny petitioner discretionary release on parole. He is serving an indeterminate term of 1 1/3 to 3 years following a conviction for driving while intoxicated. Among the arguments advanced in the petitioner, the petitioner maintains that the Parole Board based its determination solely upon the seriousness of the instant offense and his criminal history, without consideration of other relevant factors. In support of his contention that the Parole Board failed to comply with Executive Law § 259-c (4), the petitioner makes reference to his COMPAS Re-entry Risk Assessment , which found him to be at low risk in the areas of felony violence, arrest and absconding. He maintains that his due process rights were violated, in part, by reason that the parole determination lacks a detailed analysis of the facts, and that it was "blatantly apparent" that the Parole Board ignored his institutional accomplishments, goals and release plans. He criticizes the Parole Board for considering crimes he committed twenty years ago. In his words, the Board "employed past-focused rhetoric not future-focused risk assessment analysis". The petitioner asserts that the Parole Board failed to evaluate the likelihood that he presents a current danger to society (which he claims he does not). For all of the foregoing reasons, the petitioner asserts that the determination is arbitrary and capricious.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Denied, Hold for 24 months to 11-15.
>
> "Parole is denied. 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.

> "This decision is based upon the following factors: Your instant offenses are driving while intoxicated wherein you operated a motor vehicle with a BAC of .19 percent. You further had your child in your vehicle and rear ended a vehicle at a traffic light. Your behavior presents a risk to the traveling public. This is your third state prison term. Your record dates back to 1976 and spans two states, includes felonies, misdemeanors, prior prison and/or jail and a failure at prior community supervision. You clearly failed to benefit from prior efforts at rehabilitation. Note is made by this board of your EEC, Merit, Sentencing Minutes, Compas Risk Assessment, rehabilitative efforts, risk, needs, parole plan, letters of support, disciplinary record and all other required factors. Merit release is hereby denied []".

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of Delrosario v Evans, 121 AD3d 1152, 1152-1153 [3d Dept., 2014]; Matter of Williams v New York State Division of Parole, 114 AD3d 992 [3d Dept., 2014; Matter of Campbell v Evans, 106 AD3d 1363, 1363-1364 [3d Dept., 2013]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as his acquisition of a merit certificate and earned eligibility certificate. Inquiry was made by Commissioner Smith concerning petitioner's plans upon his release. The petitioner mentioned entering an outpatient treatment program

and attending AA meetings. By way of employment, the petitioner indicated that he would work as a carpenter framing houses and doing remodeling. Commissioner Smith reviewed findings from petitioner's Compas Risk Assessment instrument, noting that while the petitioner was at low risk for violence, his rating for reentry substance abuse was "highly probable". It was noted that the petitioner had only one Tier 2 disciplinary "ticket". It was also noted that there were letters of support for petitioner's release in the record. He was afforded ample opportunity to speak on his own behalf.

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Williams v New York State Division of Parole, supra; Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Davis v Evans, 105 AD3d 1305 [3d Dept., 2013]; Matter of MacKenzie v Evans, 95 AD3d 1613 [3d Dept., 2012]; Matter of Matos v New York State Board of

Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (Matter of Dorman v New York State Board of Parole, 30 AD3d 880 [3rd Dept., 2006]; Matter of Pearl v New York State Division of Parole, 25 AD3d 1058 [3rd Dept., 2006]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate

expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). As noted, the decision of the Parole Board provided adequate reasons, supported in the record, why he should not be released. The Court, accordingly, finds no due process violation.

The Parole Board properly engaged in a risk and needs assessment as required under Executive Law § 259-c (4), including review of the COMPAS instrument (see Matter of Delrosario v Evans, 121 AD3d 1152, supra; Matter of Partee v Evans, 117 AD3d 1258, 1259 [3d Dept., 2014], lv denied 24 NY3d 901 [2014]). "The COMPAS instrument, however, is only one factor that the Board was required to consider in evaluating petitioner's request" (Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1109 [3d Dept., 2014]).

Lastly, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Campbell v Evans, 106 AD3d 1363, supra, at 1364, citing Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604 [2002]).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

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 separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: February 3, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated October 30, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 9, 2015, Supporting Papers and Exhibits
3. Affirmation of Terrence X. Tracy, Esq., dated December 31, 2014, Supporting Papers and Exhibits

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera* review in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit D, Confidential Portion of Inmate Status Report, Exhibit E, COMPAS Re-Entry Risk Assessment, and Exhibit F , COMPAS Reentry Risk Assessment, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: February 3 , 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice