September 2021

Decision in Art. 78 proceeding - Byrdsong, Tracy (2021-04-08)

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of
TRACY BYRDSONG,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER AND TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,

Respondents.

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DECISION AND ORDER

Index No.: 2020-54062

ACKER, J.S.C.

The following papers, numbered 1 to 26, were considered on Petitioner's application pursuant to CPLR Article 78 challenging Respondents' denial of his release to parole supervision:

Order to Show Cause-Verified Petition-Exhibits 1-11-Affirmation of Martha Rayner, Esq. 1-14
Answer and Return-Exhibits 1-10[1] ..... 15-25[2]
Affirmation in Reply 26

Petitioner Tracy Byrdsong ("Petitioner") commenced the instant proceeding seeking an Order directing Respondents to hold a *de* novo parole interview before Commissioners who did not participate in either the March 2020 decision denying him release to parole supervision or in

[1] The Court also reviewed, *in camera*, the confidential documents submitted by Respondents as Exhibit 10 (entire exhibit) and portions of Exhibits 3 and 8.

[2] Respondents' counsel indicated in an e-mail that because of technical difficulties, she was unable to upload Exhibits 5-10 and provided the Court and Petitioner's counsel with hard copies. It appears that those documents were not electronically filed thereafter. As such, in order to ensure that the NYSCEF record is complete, Respondent shall upload these exhibits immediately upon receipt of this Decision and Order.

its affirmance, that such review be held within thirty days of entry of the order and that parole be considered consistent with this Court's decision.

Petitioner is currently incarcerated at Woodbourne Correctional Facility. On or about July 1, 2010, Petitioner was convicted, upon a guilty plea, of Attempted Robbery in the Second Degree and was sentenced as a persistent violent felony offender to a term of 12 years to life. The conviction and sentence were affirmed on appeal. *People v. Byrdsong*, 114 AD3d 604 [2d Dept. 2014]. The crime underlying Petitioner's current incarceration involved Petitioner pointing an imitation gun at the victim and taking his jewelry and money. This offense was committed while Petitioner was on parole from a prior robbery conviction, for which he had been sentenced to eight years to life.

The instant application was brought as a result of the Parole Board's March 2020 decision denying Petitioner discretionary release and imposing an 18-month hold. Petitioner timely filed an administrative appeal thereafter. According to the Petition, after no administrative appeal decision was received, the instant Petition was filed This was Petitioner's first appearance before the Parole Board, after having served 12 years in prison.

Petitioner provides the following reasons as to why he alleges the Board's decision was improper: that Respondent Board (1) violated its own regulations by failing to explain how, in factually individualized and non-conclusory terms, it considered each applicable statutory factor in denying parole release; (2) failed to consider the applicable statutory factors and focused exclusively on Petitioner's criminal history and disciplinary history; (3) failed to explain its COMPAS departure; (4) predetermined the denial decision as the Board was hostile toward Petitioner and failed to explain and consider applicable factors; (5) failed to obtain the sentencing

minutes or establish that they were not available; and (6) failed to request nor consider a contemporaneous letter from the current Bronx District Attorney.

Petitioner's March 10, 2020 Interview and Decision

The transcript of Petitioner's parole interview is annexed to the Answer and Return as Exhibit 4 (hereinafter referred to as "Interview Transcript"). Respondent's Decision denying parole is contained at pages 19-20 of the Interview Transcript (hereinafter referred to as "Decision").

Relevant Law

New York Executive Law §259-i(2)(c)(A) provides that:

> [d]iscretionary 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 for law.

That section further provides that in making a parole release decision, the following eight factors shall be considered:

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;

(ii) performance, if any, as a participant in a temporary release program;

(iii) release plans including community resources, employment, education and training and support services available to the inmate;

(iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;

(v) any current or prior 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;

(vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;

(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 pre-sentence 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.

It is well settled that judicial review of a determination of the Parole Board is narrowly circumscribed. *Campbell v. Stanford*, 173 AD3d 1012, 1015 [2d Dept. 2019], *leave to appeal dismissed*, 35 NY3d 963 [2020]. A Parole Board determination to deny early release may only be set aside where it evinces "irrationality bordering on impropriety." *Id.* Moreover, pursuant to current Second Department precedent, although the Parole Board is required to consider the relevant statutory factors as identified in Executive Law §259–i(2)(c)(A)(i)-(viii), it is not required to address each factor in its decision or accord all the factors equal weight. *Id.* "Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript." *Id.*

Petitioner's application questions that portion of the above case law that provides that the Board is not required to address each statutory factor in its decision. According to Petitioner, pursuant to the 2017 amendments to 9 NYCRR 8002.3 ("2017 Amendment"), the Board must now explain how it considered each applicable statutory factor when denying parole release.

As relevant hereto, the text of 9 NYCRR 8002.3(b) now provides that

> [r]easons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the **applicable** parole decision-making principles and factors listed in 8002.2 were considered in the individual's case [emphasis supplied].

The factors listed in 9 NYCRR 8002.2 are identical to the eight factors contained in Executive Law §259–i(2)(c)(A)(i)-(viii), which are listed above.

Petitioner's counsel acknowledges that no published decision appears to have construed this revised regulatory language. Counsel further maintains that any court decisions involving a parole release denial made before the adoption of the new regulatory language are not dispositive in the instant matter. Petition, p. 5.

Although the 2017 Amendment clearly requires that additional detail be provided in any parole denial, as discussed below, said amendment does not otherwise mandate that this Court abandon long standing precedent as to parole release denials. This Court is unaware of reported decisions directly addressing the 2017 Amendment, but other courts have certainly rendered decisions upon parole denials that were made after said amendment. In fact, Respondents cite *Matter of Schendel v. Stanford*, 185 AD3d 1365 [3d Dept. 2020], in which the Third Department determined that a Board is not required to give equal weight to – or expressly discuss – each of the statutory factors. *Id.* at 1366. While this holding relies in part upon a decision in which the parole denial pre-dated the 2017 Amendment,[3] the parole denial in *Matter of Schendel* was made in October 2018, which post-dates the Amendment.

More importantly, the standard of review established by the case law is not in conflict with the new language in the regulation. Although the 2017 Amendment requires that the Board

[3] *Matter of Espinal v. New York State Bd. of Parole*, 172 AD3d 1816 [3d Dept. 2019]

address how certain factors were considered in the individual's case, it does not require the Board to "expressly discuss" each of the statutory factors. It remains well settled that the Parole Board is required to consider the "applicable" statutory factors; the Board is not required to address each factor in its decision or accord all the factors equal weight. *Campbell*, *supra* at 1015.

Further, the Petitioner misstates the language of the regulation. Counsel contends throughout the Petition that the 2017 Amendment requires that the Board "explain" how it considered each applicable factor. Yet this language is not contained in the regulation. Instead, the regulation provides that the Board shall "address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case [emphasis supplied]." Therefore, Petitioner's argument that the Board is required to "explain" how it considered every individual factor is unsupported by the plain language of the regulation.

In any event, nothing in the record before this Court demonstrates that the Board failed to comply with the 2017 Amendment in denying Petitioner parole release. Case law is clear that a determination as to whether the Board considered the proper factors and followed the proper guidelines is to "be assessed based on the written determination evaluated in the context of the parole interview transcript." *Campbell*, *supra*. Here, in denying parole, the Board identified the following applicable factors in its Decision: (1) Petitioner's poor behavior, multiple Tier II and III disciplinary reports and a high prison misconduct COMPAS score (Executive Law §259-i(2)(c)(A)(i) and (viii)); (2) that the instant offense occurred while Petitioner was on parole for attempted robbery in the first degree and that prior probation, local jail and multiple prior state sentences failed to deter Petitioner from committing the instant offense (Executive Law §259-

i(2)(c)(A)(viii)); (3) that a medium COMPAS score for criminal involvement and a high score for history of violence were disturbing and (4) most compelling was Petitioner's pattern of crime, poor record on parole and negative behavior (Executive Law §259-i(2)(c)(A)(viii)). The Decision also addressed the positive factors that the Board considered – family support, document submission, Case Plan, educational accomplishment and related low COMPAS scores (Executive Law §259-i(2)(c)(A)(i) and (ii)). Although the Decision itself does not expound on these positive factors, they were addressed in the interview transcript.

Notably, the Petition focuses almost exclusively on Petitioner's positive accomplishments, without appearing to acknowledge any of the negative portions of the record. It is uncontested that Petitioner committed the instant offense while he was on parole for a robbery conviction for which he had been sentenced to a term of eight years to life. Moreover, according to the Parole Board Report, Petitioner previously served three terms of parole and had violations and revocations on two of those terms. Petitioner also served one term of probation that was revoked. Although Petitioner was drug free for four years prior to his interview, he had accumulated numerous disciplinary infractions for drug use during this incarceration and scored "probable" on re-entry substance abuse on COMPAS. Despite all of the positive accomplishments contained in the record and painstakingly listed in the Petition, "[d]iscretionary release may not be solely granted as a reward for exemplary conduct." *Matter of Campbell, supra.*

After consideration of the Decision and the interview transcript, the Court finds that the Board complied with the 2017 Amendment. The Board addressed how it considered the applicable parole decision making principles and factors listed in 8002.2 with respect to

Petitioner and did so in factually individualized and non-conclusory terms. Contrary to Petitioner's argument, the Board is not required to explain each individual factor, nor to provide the breadth of detail that Petitioner has listed in pages 7-12 of the Petition. The Court finds that the Board acted in accordance with statutory and regulatory requirements. *Jackson v. Evans*, 118 AD3d 701, 702 [2d Dept. 2014].

Petitioner next contends that the Board failed to consider and weigh all of the required factors and exclusively focused on Petitioner's criminal history and disciplinary history. However, as was discussed above, the Board did consider the relevant statutory factors. This included Petitioner's institutional record, his disciplinary record, program accomplishments, intended plans after release regarding employment and living arrangements, as well as his criminal history, his academic achievements and the COMPAS Needs and Risk Assessment instrument. *See LeGeros v. New York State Bd. of Parole*, 139 AD3d 1068, 1069 [2d Dept. 2016]. In addition, "the interview transcript indicates that the Parole Board took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole." *Campbell, supra* at 1016. Accordingly, the record does not support the conclusion that the Parole Board's determination evinces irrationality bordering on impropriety. *Id.*

Petitioner next asserts that Respondent Board failed to explain its departure from COMPAS. 9 N.Y.C.R.R. §8002.2(a) provides that

> [i]n 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. [Emphasis supplied].

As acknowledged by Petitioner, the Decision does not state that the Board departed from a specific COMPAS score or that it disagreed with said scores. Instead, Petitioner argues that the Board's conclusion that release would be incompatible with public safety and welfare was a *de facto* departure from Petitioner's low COMPAS scores in felony violence, arrest, absconding and his "low needs scores." However, nothing in 9 NYCRR §8002.2(a) requires a Board, in denying parole, to explain each COMPAS category where a petitioner receives a low score. Otherwise, every board that denies parole would have to provide an individualized reason for every low COMPAS score. The plain language of the regulation only requires an explanation when there is a departure from a scale.

Petitioner herein fails to demonstrate that the Board's decision departed from his low COMPAS scores when it found that Petitioner's release was incompatible with the public safety and welfare. Indeed, Petitioner's "low" scores in risk of felony violence, arrest risk and abscond risk cannot be considered in a vacuum. As noted by the Board in its decision, Petitioner scored "medium" or "high" in all of the categories listed under "Criminal Involvement" and "probable" in ReEntry Substance Abuse. These elevated scores are certainly relevant when considering Petitioner's potential threat to public safety and welfare, even when considered in conjunction with other low scores.

Significantly, the majority of cases upon which the Petition relies for this argument involve petitioners who had secured the lowest score in all relevant COMPAS categories. The

COMPAS Risk Assessment contains twelve categories[4] and Petitioner herein scored the lowest score ("1") on only three of those categories. He scored "high," "probable" and "medium" in five categories.[5] Although Petitioner is listed as "low" under risk of felony violence, his score was a "3." Petitioner identifies no cases in which a court found a departure from COMPAS because of low scores in certain categories, when the COMPAS contained high scores in other categories. As the entirety of the scores contained in COMPAS can support a conclusion that Petitioner's release is incompatible with the public safety and welfare, Petitioner fails to demonstrate that the Board departed from any scale within COMPAS. Therefore, 9 NYCRR 8002.2(2) is not implicated and Petitioner is not entitled to a *de novo* interview on this ground.

Petitioner further argues that the Board's purported hostility toward Petitioner, along with the other above cited failures, indicates that the Board's Decision was predetermined. The Court disagrees. As discussed above, the Board appropriately considered the relevant statutory factors in denying parole. Moreover, the allegations regarding the Board's alleged tone and "intimidation" of Petitioner are contained in a Petition that was verified by counsel, not by Petitioner himself. Of note, it is uncontested that when considered for release during his last incarceration, Petitioner told that prior parole board that they would never see him again if they were to release him. The fact that Petitioner was then released, reoffended and was again back before a parole board bears directly on the Petitioner's credibility and the Board's assessment of him in considering whether his release is incompatible with the welfare of society. *See Silmon v.*

[4] The twelve categories are: risk of felony violence, arrest risk, abscond risk, criminal involvement, history of violence, prison misconduct, re-entry substance abuse, negative social cognitions, low self-efficacy/optimism, low family support, re-entry financial and re-entry expectations.
[5] Criminal involvement (5), history of violence (9), prison misconduct (9), reentry substance abuse (4) and low self-efficacy/optimism (7).

Travis, 95 NY2d 470, 477 (2000). Contrary to Petitioner's contention, the record before the Court does not indicate that "the denial of petitioner's application was a foregone conclusion." *King v. New York State Div. of Parole*, 190 AD.2d 423, 431–32 [1st Dept. 1993], *aff'd*, 83 NY2d 788 [1994].

Furthermore, Petitioner's argument that a new parole review is required because the Board failed to obtain the sentencing minutes, or establish that they were not available, also fails. "In the absence of any indication that the unavailable sentencing minutes contained any recommendation as to parole, the failure of the Board to obtain and consider those minutes did not prejudice the petitioner." *Midgette v. New York State Div. of Parole*, 70 AD3d 1039, 1040 [2d Dept. 2010]. Respondents have submitted the sentencing minutes as an exhibit to the Answer and Return.[6] As noted by Respondents, and not contested by Petitioner in reply, while the sentencing minutes were unavailable to the Board, there is nothing in the record indicating that the sentencing court made any parole recommendation on the record. *Id.* As such, Petitioner is not entitled to a *de novo* interview on this ground.

Finally, the Court is unpersuaded that the Board was required to request a contemporaneous letter from the current Bronx County District Attorney. Executive Law §259-i(2)(c)(A)(vii) identifies the recommendation of "the district attorney" as one of the factors to be considered by the Board. However, nothing in the Executive Law, nor in the associated regulation (9 NYCRR 8002.2 (7)) requires that the letter be from the current district attorney and Petitioner provides no case law in support of this argument. Instead, Petitioner maintains that

[6] In addition, Respondents indicate that the Appeals Division's delay in providing a decision was because they had requested, but not yet received, the sentencing minutes. The sentencing minutes were received on December 9, 2020.

the policies of the current District Attorney are "markedly different" from her predecessor, rendering the recommendation currently in the parole file "outdated." Regardless, the record before the Board included a recommendation from the district attorney, which complies with the statute.

Based upon the foregoing, the Court finds that Petitioner failed to sustain his burden of demonstrating that the challenged determination was irrational and the Petition is denied and the proceeding is dismissed. *Campbell*, *supra*, at 1016.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 8, 2021

Christi J. Acker

CHRISTI J. ACKER, J.S.C.

To: All Counsel via NYSCEF