September 2021

Decision in Art. 78 proceeding - Capo, Armundo (2010-06-18)

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Disp

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 Decision & Order, with notice of Entry, upon all parties.

SUPREME COURT OF THE STATE of New York
COUNTY OF ORANGE

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In the Matter of the Application of
ARMUNDO CAPO,

Petitioner,

-against -

NEW YORK STATE DIVISION OF PAROLE,

Respondent,

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

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DECISION& ORDER

Index No. 1037-10

Motion Date: 04/09/10

LUBELL, J.

Petitioner Armundo Capo commenced this CPLR Article 78 proceeding seeking to reverse and vacate an adverse parole release determination on the grounds that the determination (1) fails to set forth a detailed written explanation of the factors and reasons for denying parole; (2) is excessive; (3) is based solely on the serious nature of the charge; (4) disregarded the rehabilitative component of the indeterminate sentencing and parole statutes; and (5) fails to consider all of the mandatory statutory factors:

PAPERS	**NUMBERED**
VERIFIED PETITION/EXHIBITS A-E	1
ANSWER AND RETURN/EXHIBITS 1 THROUGH 8[1]	2

[1] EXHIBIT 1 (Pre-Sentence Investigations Reports) have been submitted and reviewed by the Court in camera, as has Part II (Confidential Information) and Part III (Confidential Written Report to Field").

Petitioner Armundo Capo is serving three concurrent terms of incarceration in connection with three separate convictions arising out of three separate criminal transactions: Criminal Sale of Controlled Substance in the Third Degree, 4½ to 9 years (sale of cocain to an undercover agent); Attempted Assault in the Second Degree, 1½ to 3 years (attempted assault on another inmate); and Robbery in the Second Degree, five years incarceration followed by five years of post-release supervision (gunpoint robbery). In each case, defendant was sentenced as a Second Felony Offender.

This CPLR Article 78 proceeding is brought in connection with petitioner's first appearance before the New York State Board of Parole ("Parole Board"), his October 1, 2009 perfection of an administrative appeal of same, and Parole Board's failure to timely respond within the prescribed time frame; thus, rendering ripe this application to the Court (see, 9 NYCRR §8006.4[c]).

Upon rendering judicial review of administrative determinations, the Court may not substitute its own judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis. "The New York State Board of Parole's release decisions are discretionary, and if made in accordance with statutory requirements, such determinations are not subject to judicial review" (Samperi v. Rodriquez, 126 A.D.2d 653 [2nd Dept.,1987], citing, Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412 [2nd Dept., 1985]). More simply put,

> [the Parole Board] has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a petitioner who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, bears a heavy burden.

(Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239

[1st Dept., 1998]).

The record before the Court reflects that the Parole Board considered the relevant statutory factors, including petitioner's criminal conduct, institutional behavior, programming accomplishments and his residential and employment plans upon release (Matter of Silvero v. Dennison, 28 A.D.3d 859 [3rd Dept., 2006]). Additionally, the reasons for the denial of parole were outlined in sufficient detail so as to inform Petitioner of the basis of the decision in accordance with the provisions of Executive Law § 259-i(2)(a).

The Parole Board "was not required to equally weigh or discuss each statutory factor or reward petitioner's achievements while incarcerated" (Matter of Webb v. Travis, 26 A.D.3d 614, 615 [3d Dept., 2006]; see, Matter of Wood v. Dennison, 25 A.D.3d 1056, 1057 [3d Dept., 2006]). While the Board did not specifically recite and discuss the weight which it assessed to each factor, it was not required to do so (King v. New York State Div. of Parole, 83 N.Y.2d 788, 791 [1994]). In the end, it is within the Parole Board's discretion to determine whether a prisoner's positive achievements while in prison are outweighed by the serious nature of his crime (see, Romer v. Dennison, 24 A.D.3d 866 [3d Dept., 2005]).

The determination to place a 24-month hold on petition is within the prescribed guidelines (see, Executive Law §259-i[2][a] and 9 NYCRR §8002.3[d]) and, under the facts presented, does not constitute an abuse of discretion and will not, in any event, be disturbed. This is so even in the face of petitioner's Certificate of Earned Eligibility ("CEE"). Although a CEE "creates a presumption in favor of parole release of any inmate who, like petitioner, has received a Certificate of Earned Eligibility and has completed a minimum term of imprisonment of eight years or less ..." Wallman v. Travis, 18 AD3d 304, 307 [1st Dept., 2005][citation omitted]), such is not conclusive on the issue especially where, as here, the record adequately demonstrates and there is a rational basis for concluding that a "reasonable probability" exists that, if released, the inmate will not be law abiding and that such release is not compatible with the welfare of society.

There being no merit to these or any other contentions

raised by Petitioner, and the Court being satisfied that the Board gave adequate and due consideration to the statutory factors and that Petitioner failed to demonstrate any impropriety with the challenged determination such that it can be said to be affected by irrationality bordering on impropriety or is otherwise subject to annulment (see, Romer v. Travis, 299 A.D.2d 553 [2nd Dept., 2002]; Matter of Larrier v New York State Board of Parole Appeals Unit, 283 A.D.2d 700 [3rd Dept., 2001]; Matter of Guerin v New York State Division of Parole, 276 A.D.2d 899 [3rd Dept., 2000]), it hereby

ORDERED, the petition be and is hereby denied.

ORDERED, that the petition be and is hereby dismissed in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York
June 18, 2010

S/_____
HON. LEWIS J. LUBELL, J.S.C.

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