September 2021

Decision in Art. 78 proceeding - Dempsey, Hawkins (2015-05-11)

[*1]

Matter of Hawkins v New York State Dept. of Corr. & Community Supervision
2015 NY Slip Op 51995(U) [51 Misc 3d 1218(A)]
Decided on May 11, 2015
Supreme Court, Sullivan County
LaBuda, J.
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Decided on May 11, 2015

Supreme Court, Sullivan County

In the Matter of the Application of Dempsey Hawkins, 79 B 0609, Petitioner,

against

New York State Department of Corrections and Community Supervision, Anthony J. Annucci, Acting Commissioner, New York State Board of Parole, Tina Stanford, Chairperson, Respondents.

0011-15

Issa Kohler-Hausmann, Esq., and Christopher Seeds, Esq., 230 Hancock Street, No.4, Brooklyn, NY 11216, Attorneys for Petitioner

Attorney General of the State of New York, One Civic Center Plaza—Suite 401, Poughkeepsie, NY 12601, By: Leilani Rodriguez, AAG, of counsel, Attorney for Respondents

Frank J. LaBuda, J.

This matter comes before the Court on Petitioner's request for immediate release to parole, or in the alternative, a *de novo* parole hearing. Respondents have submitted an affirmation in opposition. Petitioner submitted a reply The court heard oral argument on March 13, 2015.

At the outset, Respondents argued, and this Court agrees, that the Court is without authority at this time to order Petitioner's immediate release. For the reasons stated below, however, the Petitioner is entitled to a *de novo* parole hearing.

Factual and Procedural Background

On May 15, 1976, then 16-year-old Petitioner strangled his 14-year-old girlfriend and hid her body in a 55-gallon drum in a wooded area. The location of the murder was within feet of the location in which Petitioner hid the body. He was able to evade arrest for approximately 22 months, during which time he participated in searches with the victim's family and friends, and then moved out of state, to Illinois. He was eventually arrested in Illinois on May 5, 1978, extradited to New York, and charged with Murder in the Second Degree. He was tried by a jury in Richmond County (Staten Island, New York) after which trial the jury found Petitioner guilty [*2]of Murder in the Second Degree. On April 6, 1979, the court sentenced Petitioner to an indeterminate term of 22 years to life in state prison.

Petitioner was 54 years old and had served 36 years of his sentence at the time of his last parole interview (14 years beyond his minimum sentence) on March 26, 2014, which was his ninth appearance, at Mt. McGregor Correctional Facility.[FN1] The hearing took place before Commissioners W. Smith, Hernandez and Elovich. The board denied parole release and imposed a 24-month hold. Petitioner timely filed a notice of administrative appeal and timely perfected said administrative appeal. Petitioner then timely filed the within petition for Article 78 review.

Petitioner argues that the board's decision focused exclusively on the instant offense, ignored Petitioner's overall excellent disciplinary record, ignored Petitioner's institutional achievements, support for release, plans for release, and final order for deportation, rendering the decision to deny parole arbitrary and capricious. Petitioner further contends that the Commissioners were misinformed and argumentative, that they ignored the juvenile age of Petitioner when he committed the instant offense, and violated their own rules when considering parole. For the reasons stated below, this Court agrees with Petitioner's arguments and grants the within petition for a *de novo* parole interview.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

> In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships 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....

The parole board must also consider whether "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 the law." **9 NYCRR 8002.1**.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;

(b) the inmate's release plans;

(c) any statement made to the board by the victim's representative;

(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and

(e) the inmate's prior criminal record.

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison*, 41 AD3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any guidelines in its determination. ***Walker v. Travis*, 252 AD2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis*, 95 NY2d 470 [2000]; *Russo v. New York State Bd. of Parole*, 50 NY2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005]; *Malone v. Evans*, 83 AD3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1980]**; ***Epps v Travis*, 241 AD2d 738 [3rd Dept. 1997]; *Matter of Silmon v. Travis*, 95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans*, 81 AD3d 1059 [3rd Dept. 2011]**; ***Matter of Wise v. New York State Division of Parole*, 54 AD3d 463 [3rd Dept. 2008]**. Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. **Executive Law, §259-i(2)(c)(A)** requires that the board make parole determinations pursuant to **Executive Law, §259-c(4)**. The changes to **Executive Law, §259-c(4)** became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)(c)(A)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-c(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Executive Law, §259-c(4) requires the board to

> Establish written procedures for its use in making parole decisions as required by law. Such written procedures 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, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

By revising these two sections of the Executive Law, the legislature established the *method* by which the board must assess whether an inmate seeking parole has met the release standard, by reference to the "written procedures" adopted pursuant to **§259-c(4)** , which procedures *must* incorporate risk and needs principles to measure whether the inmate has met the release standards. While the risk and needs assessment establishes a presumptive finding by offering a [*3]scientific assessment of whether the inmate has met the standard established in **§259-i(2)(c)(A)**, the board must still make its final determination by considering the factors enumerated in **§259-i(2)(c)(A)**.

Last, **Executive Law §259-i(5)** states, "any action by the board or by a hearing officer pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with the law." In ***Matter of Hamilton v. New York State Division of Parole*, 119 AD3d 1268 [3rd Dept. 2014**, the Third Department held, "so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts." ***Id*. At 1269, *quoting Matter of Hines v. State Bd. of Parole*, 293 NY 254 [1944]**. That does not mean administrative parole decisions are virtually unreviewable; ***Hamilton*** simply clarifies what the statute has demanded for many years—that any action by the board *must* be in accordance with the law, or it is subject to judicial review.

Discussion

While a parole board enjoys a significant level of discretion, the discretion is not unlimited. There are numerous things a parole board cannot do. First, a parole board cannot base its decision to deny parole release solely on the serious nature of underlying crime. ***Rios v. New York State Div. of Parole*, 15 Misc 3d 1107(A) [Sup. Ct. Kings Co. 2007]; *see also*, *King v. New York State Division of Parole*, 190 AD2d 423 [1st Dept. 1993], *aff'd* 83 NY2d 1277**. Second, while the board need not consider each guideline separately, and has broad discretion to consider the importance of each factor, the board *must still consider the guidelines*. **Executive Law §259-i(2)(a); *Rios*, *supra*.** Third, the reasons for denying parole must be given in detail and not conclusory terms. **Executive Law §259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005]**. Last, a parole board cannot retry an inmate, harass, badger or argue with an inmate, second guess the findings of competent experts involved in the inmate's trial, or infuse their own personal beliefs into the proceeding. ***King*, *supra* at 432**.

In ***King***, the First Department stated:

> [W]hile the courts remain reluctant to second-guess the decisions of the Board, 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 court ***must*** intervene. ***Id*., at 431**. *Emphasis added*.
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> The role of the Parole Board is not to resentence petitioner, according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, *as of this moment*, given all of the relevant statutory factors, he should be released. In that regard, the statute expressly mandates that the prisoner's educational and other achievements

affirmatively be taken into consideration in determining whether he meets the general criteria relevant to parole release under section 259-i(2)(c). ***Id.*, at 432**. *[*4]Emphasis added*.

The board must also adhere to its own rules and regulations and the laws as set forth in the Executive Law and those laws and rules must not conflict. Amended **9 NYCRR §8002.3** states, "In making any parole release decision the following factors shall be considered," and then enumerates the eight statutory factors listed in **§259-i(2)(c)(A)**. It then, however, curiously adds two more *factors* for consideration—(1) the most current risk and needs assessment, and (2) the most current case plan prepared pursuant to **Correction Law §71-a**. Therefore, it appears that the regulation adds as *factors* that which the legislature intended as *methods* for assessing whether an inmate has *presumptively* met the standard for parole release. This, is turn, allows the board to treat the risk and needs assessment in the same manner in which it treats any of the eight factors listed in **§259-i(2)(c)(A)**, and assign it any weight, or no weight at all. The statutory scheme, however, is clear that the validated instrument must be a point of departure for the assessment, and the board must consider the listed statutory factors in deciding whether the presumptive findings from the risk and needs instrument ought to be disturbed. An administrative agency is "without power to promulgate rules in contravention of the will of the legislature, but is imbued with such powers as are conferred by Legislature by specific terms of its enabling act." ***See Finger Lakes Racing Ass'n, Inc. v. New York State Racing & Wagering Bd.*, 45 NY2d 471 [1978]**.

After a thorough review of the record before this Court, including the confidential materials for *in camera* review, this Court has determined the decision to deny parole release to Petitioner was so irrational as to border on impropriety. The Commissioners based their decision to deny parole release to Petitioner solely on their personal opinions of the nature of the instant offense, improper characterizations of Petitioner's actions following the murder, did not consider all of the guidelines or factors, the decision was in conclusory terms and unsupported by the record, and at least two Commissioners were argumentative and appeared to have made the decision prior to the parole interview.

First, there was confusion regarding whether Petitioner was adjudicated a youthful offender (hereinafter, "YO") for an attempted burglary and on probation at the time of the instant offense. To clarify, the crime for which Petitioner was adjudicated a YO occurred the day before Petitioner murdered the victim. He was not adjudicated a YO for that attempted burglary until almost one year later. Therefore, he was not a YO on probation at the time he committed the instant offense.

Second, the record indicates that the vast majority of the interview consisted solely of discussion about the instant offense. Although there were three commissioners present at Petitioner's interview, two of the three only asked questions regarding the instant offense—they did not ask one single question regarding any other factor or issue. Commissioner Hernandez only asked detailed questions regarding the specifics of the crime. Commissioner Elovich also only asked specific questions about the instant offense, at times seeking graphic detail. Dissatisfied with Petitioner's answers regarding his mind-set when he was 16 years old, both commissioners continued their questions to the point of being argumentative and harassing. It is unclear to this Court what Commissioners Hernandez and Elovich were trying to elicit from Petitioner. This Court has been unable to find any statutory or case law that authorizes parole [*5]board commissioners to infuse their own personal opinions or speculations into the parole interview or process. ***See King*, *supra***.

There is no additional rational, other than the board's opinion of the heinous nature of the instant offense, and personal beliefs and speculations, to justify the denial of parole release: Petitioner has had an overall excellent disciplinary record while incarcerated,[FN2] has completed college courses while in prison, has completed every program offered by DOCCS as well as additional programs; and his youthful offender history is unremarkable. Petitioner submitted numerous letters of recommendation for his release and he has a substantial support system on the outside, release plans, and a final order of deportation to the United Kingdom, where authorities are aware of his status and prepared to assist him with housing and other opportunities. His extended family in London is prepared to house and assist him upon his return to London. Despite everything that supported parole release for petitioner, the record reflects that the board found its own determination of the nature of the crime determinative of its decision, rather than taking the risk and needs assessment as a point of departure and then meaningfully considering all eight statutory factors as found in **Executive Law §259-i(2)**.

Petitioner has repeatedly expressed remorse, shame and guilt for murdering the victim and takes full responsibility for his actions. He cannot change what he did, yet the board in this matter, as did the previous boards, spent significant portions of the parole interview badgering Petitioner about the instant offense and appeared to disregard Petitioner's repeated explanations regarding his apparent lack of remorse at the time of the crime being due to his young age. Petitioner's argument that the decision to deny parole was based solely

on the board's opinion of the serious and violent nature of the instant offense and nothing else is supported by the transcript; a transcript that indicates that while the board paid lip service to some of the statutory factors, it clearly ignored the other materials in Petitioner's file, all of which support release for this inmate.

> Certainly, every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the seriousness of the crime itself. ***King*, *supra*, at 433**.

This board failed to cite any aggravating factors in Petitioner's case and the remainder of the hearing transcript in Petitioner's case reveals that the board discussed other factors and Petitioner's achievements while in prison in a very perfunctory manner. Other than an indication that they misunderstood Petitioner's deportation order status and discussing that briefly, the board never discussed anything other than the instant offense in detail. ***See*, *Matter of Coaxum v. New York State Board of Parole*, 14 Misc 3d 661 [Sup. Ct. Bronx Co. 2006]**.

After spending almost the entire hearing questioning Petitioner about the instant offense and then making the obligatory, but superficial inquiry into other factors, the board somehow [*6]concluded his release would be incompatible with the welfare and safety of the community and that his release would "so deprecate the serious nature of the crime as to undermine respect for the law," without any further detail. Petitioner asks how that is so; Respondents provided no specific explanation in their answering papers or during oral argument. This board, like the ones before it, conducted Petitioner's parole interview in violation of the law.

Respondents argued strenuously that ***Hamilton*, *supra*,** and **Executive Law §259-i(5)** significantly limit judicial review to whether the board acted in accordance with the law. This Court reads ***Hamilton*** differently, and although it agrees with the dissenting opinion of Hon. Karen K. Peters, must nevertheless apply the ***Hamilton*** holding to the case at bar. The Third Department held that as long as the parole board violates no positive statutory requirement, the Court cannot disturb its decision. In Petitioner's case, this Court has determined that the board violated a positive statutory requirement. The board violated the statutory requirement to provide a detailed decision. There is no detail in the decision, and it reads more or less just like the decisions from Petitioner's previous parole denials as well as those from hundreds of other denials that come before this Court for review. There is no explanation for a denial of parole, other than reiterating the facts of the crime. That is insufficient. Petitioner has already been tried for murder and was convicted and sentenced by a judge pursuant to statutory sentencing guidelines. A parole interview is not supposed to be a re-trial, which is what Petitioner's interview amounted to, particularly when considering the questions by Commissioners Hernandez and Elovich. Parole interviews were not intended to circumvent the sentencing guidelines created by the legislature; if the legislature saw fit to punish murder in the second degree with a sentence of life without parole, it could have done so. Allowing a parole board to rely on the seriousness of the instant offense in every decision to deny parole release to an inmate who is serving an indeterminate sentence of a minimum amount of years to life, and who is otherwise ready for release, amounts to nothing short of allowing the parole board to rewrite the sentencing guidelines for murder in the second degree to life without parole until a parole board decides otherwise. Contrary to Respondents' arguments, this Court does not interpret ***Hamilton*** to mean the Division of Parole can forever rely on the nature and seriousness of the underlying offense to deny parole forever to an inmate whose record indicates he has been completely rehabilitated. This Court does not interpret ***Hamilton*** to mean that randomly chosen Commissioners have the discretion and power to re-try, resentence, and punish inmates in contravention of the statutory mandates and punishments meted out by judges.

The transcript leaves no doubt that this parole board based its denial of parole on the commissioners' personal opinions regarding the nature of the offense, and their personal opinions regarding Petitioner's behavior after he murdered the victim. As Petitioner correctly pointed out in his submissions—the board imbued a 16-year-old boy with what they thought would be appropriate adult behavior in a situation involving a juvenile offender, not an adult. That the trial court did not treat Petitioner as a juvenile offender and sentence him as such is not the issue; the issue is whether this parole board applied an appropriate and legal standard of review in this case. Badgering Petitioner about why he acted a certain way, or why his manner seemed lacking in affect, despite his repeated answers that he was 16 years old and was scared after he committed the crime, ran afoul of the guidelines to which the board is bound to adhere.

During oral argument, counsel for Respondents argued that under ***Hamilton***, Supreme [*7]Court's review of a denial of parole is limited to whether there was something inappropriate about the interview that would cause it to be considered arbitrary and capricious. A review of the record and specifically the transcript in the case at bar indicates much of the interview was inappropriate. This Court

finds that the questions by Commissioners Hernandez and Elovich establish that they considered nothing other than the instant offense, and Petitioner's submissions strongly suggest the decision was prepared prior to the interview; the Court takes note of the fact that the board rendered its written decision within hours of Petitioner's appearance. The conduct of this parole board is exactly the type of conduct that warrants review by a court of law. This is not the first time this Court has had to admonish a parole board (***See,*** ***Matter of Winchell v. Evans*****, 32 Misc 3d 1217(A) [Sup Ct Sullivan Co 2011]**, concerning inmate Craig Winchell, who was eventually paroled after his 12th appearance before a board consisting of past Commissioner Andrea Evans and another commissioner.). It is disturbing to this Court that Commissioner Elovich sought morbid details of the murder and subsequent placement of the body. Surely, the ***Hamilton*** decision does not, and was not intended to, allow for parole commissioners to make inquiries such as that without affording an inmate judicial review of whether such an inquiry is statutorily proper or relevant to the administrative proceeding.

Because the decision lacks any support from the record, this Court is left with no ability to evaluate why the commissioners on the board denied parole. ***See Canales v. Hammock*****, 105 Misc 2d 71 [Sup. Ct. Richmond Co. 1980]**. Nor is Petitioner left with any ability to figure out what it is he should do to convince any parole board that he is rehabilitated and ready for release back into society—in this case, in London. ***See Greene v. Smith*****, 52 AD2d 292 [4th Dept. 1976]**. Looking at the record as a whole, the Court concludes that not only does the record fail to clarify on what specific grounds the board denied parole, but the record strongly supports parole release for this inmate, who has served well beyond his minimum sentence. The board's decision and Respondents' counsel's oral argument fail to specify why the board concluded Petitioner's release would be incompatible with the safety and welfare of society or why his release would deprecate the serious nature of the crime so as to undermine respect for the law. ***Rios*****,** ***supra***.

> ....While making a passing reference to [Petitioner's] positive programmatic efforts,' the Parole Board made clear that those factors no matter how impressive, could not justify his release form prison when weighed against the seriousness of the crime. Thus, the passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the parole board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime (*see Matter of Phillips v. Dennison, NYLJ,* Oct. 12, 2006, at 23, col1; *quoting Matter of King*, 190 AD2d at 434." ***Rios*****,** ***supra***.

The board in this matter has failed to articulate any specific reasoning for its decision to deny parole release to Petitioner, and therefore this Court holds the decision was arbitrary and capricious. The board simply restated the usual and predicable language contained in so many parole release denial decisions, with no specificity or other explanation to justify parole denial.

This court stated in ***Winchell***:

> What occurred [at the parole interview] was...willful disobedience to the law. Through its own conduct, as reflected in the transcript, it is obvious that before the petitioner even appeared, the members of this Parole Board had no intention of entertaining even the slightest thought of his parole. **32 Misc 3d at 1217**.

Based on the record in the instant matter, it appears that at least two of the commissioners on this board, like the board in ***Winchell***, began the interview and proceeded through much of it with antagonism toward Petitioner. Therefore, this Court is left to conclude that the board had no intention of considering parole release to Petitioner herein prior to even meeting with him.

While this Court recognizes the substantial discretion afforded to parole boards by statutory authority, and now in the Third Department under ***Hamilton***, that authority and parole board decisions are still reviewable by courts and must stand up to the law and statutory requirements regarding parole release interviews and procedures. The Court of Appeals affirmed ***King*** and it has not been overruled. The role of the parole board is not to re-try and resentence inmates based on personal opinions, ***King*****,** ***supra*****,** bias, or a disagreement regarding the sentencing guidelines for murder in the second degree. It is unlawful for the parole board to act beyond the scope of its statutory authority, to chastise inmates for past criminal behavior they cannot change, and to prolong punishment based on personal beliefs even when an inmate has become rehabilitated and the likelihood of recidivism is nil.

In the instant matter, the Court finds that the board completely failed to provide an unbiased and fair parole interview to Petitioner, rendering the procedure and decision arbitrary and capricious, and so irrational so as to border on impropriety. The board in this case failed to meet the most basic standards of conduct required by the statute by rendering a conclusory decision, clearly based on personal opinions and the instant offense, and completely unsupported by the record and Petitioner's history of incarceration.

Although Petitioner raised several additional interesting an provocative arguments, this Court will not address those arguments in light of the above-discussion and decision.

Based on the foregoing, it is therefore

ORDERED, that the petition is granted to the extent that the Parole Board shall afford the petitioner herein a *de novo* parole hearing/interview within thirty (30) days of the date of entry of this order, and a decision thereon not more than fifteen (15) days thereafter; and it is further

ORDERED, that the *de novo* hearing herein shall consist of at least two Parole Board members, none of whom sat on the prior parole hearing involving the above captioned inmate; and it is further

ORDERED, that Commissioner Elovich is forbidden from participating in any parole matters involving Petitioner.

This shall constitute the Decision and Order of this Court.

DATED: May 11, 2015
Monticello, New York
Hon. Frank J. LaBuda
Acting justice Supreme Court

*[*8]Papers considered*:

Notice of Petition, by Issa Kohler-Hausmann, Esq., and Christopher Seeds, Esq., dated January 5, 2015

Verified Petition with Exhibits, by Issa Kohler-Hausmann, Esq., and Christopher Seeds, Esq., dated January 5, 2015

Memorandum of Law with Exhibits, by Issa Kohler-Hausmann, Esq., and Christopher Seeds, Esq., dated January 5, 2015

Answer and Return with Exhibits, by Leilani Rodriguez, AAG, dated February 12, 2015

Reply, by Issa Kohler-Hausmann, Esq., and Christopher Seeds, Esq., dated February 25, 2015

Documents from Respondents for *in camera* inspection

Transcript of Oral Argument

Footnotes

Footnote 1: Mt. McGregor Correctional Facility was closed shortly after Petitioner's parole interview in March of 2014. Petitioner is currently housed at Woodbourne Correctional Facility.

Footnote 2: This Court agrees with Petitioner that it is inexplicable how this board found Petitioner's disciplinary history "disturbing" (Petitioner has had no tickets since 2000), yet the previous board, in 2012, characterized Petitioner's disciplinary history as clean.

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