September 2021

Decision in Art. 78 proceeding - Fanning, Francis B. (2013-03-19)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
FRANCIS B. FANNING, II, 92-B-1827

Petitioner,

-against-

ANDREA EVANS,

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 # 01-12-ST3975 Index No. 4945-12

Appearances:

Francis B. Fanning, II
Inmate No. 92-B-1827
Self represented Petitioner
Mohawk Correctional Facility
6514 Rt. 26 PO Box 8450
Rome, New York 13440

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224-0341
(Keith A. Muse, Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Mohawk Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a denial of parole. Petitioner argues that the Parole Board decision was improperly based upon the serious nature of the crime without consideration of his

prison record.

Petitioner was convicted after trial of two counts of Sodomy 1st degree; two counts of Sexual Abuse 1st degree; and two counts of Endangering the Welfare of a Child on July 27, 1992. He was sentenced to two consecutive terms of 8 1/3 to 25 years on the Sodomy convictions and 2 1/3 to 7 years on the Sexual Abuse convictions to be served concurrently. He was also sentenced to 1 year on the Endangering the Welfare of a Child convictions. The crimes involved two female children ages 8 and 10 at the time of the crimes. The petitioner was babysitting the children at the time. Petitioner has appeared on two other occasions before the Parole Board and was denied parole each time. The parole denial being challenged arises from his third appearance before the Board on June 14, 2011.

In its decision denying Petitioner parole release, the Board stated:

Denied - Hold for 24 months, Next appearance 6/2013

After a review of the record and interview, the panel has determined that if released at this time your 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.
This decision is based on the following factors:
Your instant offenses are two counts of sodomy second degree and two counts of sexual abuse first degree. Your crimes involved you engaging in deviant sexual conduct with two young female victims.

The Board notes your program accomplishments and letters of support. More compelling, however, is the extreme violence you exhibited towards two vulnerable victims, and your callous disregard for their physical and emotional well-being.

Based on the above, your release at this time is not appropriate.

Petitioner filed an administrative appeal by filing a Notice of Appeal on June 19, 2011 The appeal brief was submitted on November 29, 2011. The Appeals Unit affirmed the Board's

decision, mailing such decision to petitioner and his attorney on April 23, 2012. This article 78 petition is verified August 21, 2012 and stamped by the office of the Albany County Combined Courts on September 21, 2012.

Petitioner asserts in two causes of action that the Parole Board actions were arbitrary, capricious, or irrational, in that (i) it only considered the crimes he was convicted of without consideration of his prison record and (ii) the respondent demonstrates a predetermined policy of denying sex offenders parole.

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). 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 Pérez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview[1] reveals that, in addition to the instant offenses which petitioner admitted to details of at the parole interview, attention was paid to such factors as petitioner's anticipated

[1] Transcript of parole interview, Respondent's exhibit F

completion of the Sex Offender Program, job skills he acquired from prison programs, his disciplinary record and his plans for a job and living arrangements upon release, and letters of support. Petitioner was afforded ample time in the hearing to make comments supportive of his release, petitioner expressed his regret for the impact the crimes had and will have upon the victims. 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 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). 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 MacKenzie v Evans, 95 AD3d 1613, 1614 [3d Dept., 2012]; Matter of Matos v New York State Board of Parole,; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). 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).

Petitioner at his parole interview did not raise any concern that the parole board had a predetermined policy to deny sex offenders parole. The issue was not raised in petitioner's administrative appeal brief.[2] The issue is raised for the first time in this Article 78 Proceeding. Respondent in its Answer raises as an objection in point of law that the petitioner has waived that claim.

It has long been the law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law, see Watergate II Apts. v Buffalo Sewer Auth.46 NY2d 52, (1978); Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, (1975). Petitioner has failed to exhaust his available administrative remedy with respect to his second cause of action.

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

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must 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

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[2] Petitioner's administrative Appeal Brief, respondent's Exhibit H.

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: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 10, 2012
2. Verified Petition dated August 20, 2012 with Exhibits
3. Answer Dated November 5, 2012
4. Reply affidavit with Exhibit dated November 17, 2012

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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 C, Presentence Investigation Report, and respondent's Exhibit E, Confidential Portion of Inmate Status Report, 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: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice