September 2021

Decision in Art. 78 proceeding - Gerena, Charles (2007-06-08)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of CHARLES GERENA,

Petitioner,

-against-

NEW YORK STATE BOARD 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 # 01-07-ST7497 Index No. 1977-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Mid-State Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated April 25, 2006 to deny petitioner discretionary release on parole. The petitioner is serving terms of imprisonment for convictions of sodomy 1st degree (two counts), attempted sodomy 1st degree, burglary 2nd degree and sexual abuse 1st degree. The sexual offenses involve abuse/molestation of his ten and eleven year old victims. He was released on parole on December 23, 2003, however on February 28, 2004 he was arrested for alleged parole violations, including having pornography on his computer. He was found guilty and received a 28 month hold, with a scheduled parole eligibility date of April 28, 2006. Shortly after being received by the New York State Department of Correctional Services he was placed on a waiting list for sex offender therapy and Alcohol and Substance Abuse Treatment ("ASAT"). He was never admitted to either program. By written notice dated January 19, 2006 he was informed that he would be appearing before the Parole Board in April 2006. A corrections officer allegedly informed him that this was merely a formality. On April 17, 2006 parole officers allegedly visited petitioner's wife and informed her that the petitioner would be released on April 28, 2006. On April 25, 2006 the petitioner was called before the Parole Board panel at Groveland Correctional Facility for a parole interview. Parole was denied and he was placed on a 15 month hold. Among the reasons given for the denial of release was that he had not completed a sex offender program.

The petitioner maintains that he has a good disciplinary record; that he never refused

any programming; and received numerous achievement certificates including a certificate of earned eligibility.

Petitioner asserts that he has been on the waiting list for the Sex Offender program and ASAT program since August 2004. He maintains that all inmates must be placed in an eight month sex offender program at least eight months prior to an inmate's earliest release date., which in this instance was April 28, 2006. He argues that the Department of Correctional Services improperly "predetermined" that parole would not be granted by not enrolling him in the sex offender therapy program. He asserts that the Division of Parole knew of the Department of Correctional Services policy and that therefore is complicit in the policy. Petition asserts that his certificate of earned eligibility creates a presumption of release. The petitioner argues that he should not be held accountable for failing to complete programs that respondents prevented him from taking. In his view, the Parole Board has a duty and responsibility to justify its decision in a way that is beneficial to the inmate, so that the inmate will be released the next time he is up for parole. He criticizes the Parole Board for improperly assuming the role of the judiciary in re-sentencing him for crimes for which he was already sentenced. The petitioner asserts that, without prior warning, he was brought before the Board on April 25, 2006. He maintains that the lack of notice constituted a fundamental failure of procedural due process.

Respondent points out that on February 7, 2007 the petitioner filed a grievance with regard to the failure of the Department of Correctional Services to admit him to a sexual

offender program. The inmate grievance committee deadlocked on a decision. The Superintendent denied his grievance on February 28, 2007. The Central Office Review Committee upheld the Superintendent's determination on April 4, 2007, after commencement of the instant proceeding. The respondent argues that the petitioner failed to exhaust his administrative remedies with respect to the grievance by not awaiting the determination of the Central Office Review Committee.

A time assessment is defined as "a period of time which is fixed as a result of a final parole revocation hearing and which determines a date by which time the parole violator will be eligible for re-release" (see 9 NYCRR § 8002.6 [a]). Eligibility for re-release is governed by 9 NYCRR § 8002.6 (c) (1), including subparagraph (iv) which recites as follows:

> "Eligibility for re-release. All parole violators identified as eligible for re-release as defined by subdivision (a) of section 8002.6, will be re-released to parole supervision as soon as practicable after completion of the delinquent time assessment imposed irrespective of whether they are in State or local custody. If, at the completion of the delinquent time assessment imposed, the parole violator is serving the balance of a definite sentence of incarceration, the parole warrant will be lifted upon completion of the delinquent time assessment. However, when presented with one or more of the following circumstances, the board of parole will consider the violator's re-release pursuant to subdivision (d) of this section[1]:... (iv) the board receives any

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[1]9 NYCRR 8002.6 (c) recites as follows:

> "Consideration by the parole board. (1) Parole violator in local custody. If at any time preceding the expiration of the time assessment imposed, the parole violator is identified as an exception for re-release eligibility under subdivision (c) of section 8002.6 and the parole violator remains in local custody, the

> information that supports a reasonable conclusion that the parole violator may not be suitable for re-release. Such information shall include, but not be limited to, information pertaining to self-destructive or threatening behavior by the parole violator" (9 NYCRR § 8002.6 [c] [1] [iv]).

As stated in People ex rel. Leggett v Leonardo (274 AD2d 699 [3rd Dept., 2000]), "[a] time assessment period fixed as a result of a final parole revocation hearing determines the date upon which a parole violator may be considered for re-release by the Board of Parole" (People ex rel. Leggett v Leonardo, supra, at 700). Thus, as pointed out by the respondent there is no guarantee that an inmate will be released after expiration of a time assessment.

With respect to the inability of petitioner to participate in a sex offender program, there is no evidence to support petitioner's conclusory assertion that the respondents deliberately prevented petitioner from participating in such a program for inappropriate reasons. Apart from the foregoing, with respect to the alleged failure of the petitioner to exhaust its administrative remedies in connection with his grievance, "it is hornbook 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" (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist.,

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> violator will be considered for re-release by the board upon the violator's return to a state correctional facility. Such consideration shall be through an interview by a panel of two or more members of the board of parole as soon as practicable from the time of the violator's return to state custody. When the board of parole considers the parole violator for re-release, there shall be no presumption, express or implied, favoring the violator's re-release."

37 NY2d 371, 375). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d, 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). This principle has been applied with consistency in dealing with administrative determinations involving inmates (see, Matter of Hakeem v Wong, 223 AD2d 765, 765 [3rd Dept., 1996]; Matter of Banks v Recore, 245 AD2d 906, 907 [3rd Dept., 1997]; People ex rel. King v Lacy, 252 AD2d 701, 701-702 [3rd Dept., 1998]; Matter of Archie Clarke v Senkowski, 255 AD2d 848, 849 [3rd Dept., 1998]).

It is well settled that the fact that an administrative appeals decision is issued during the pendency of a CPLR Article 78 proceeding does not operate to validate the petition retroactively (see Matter of Robinson v Bennett, 300 AD2d 715 [3rd Dept., 2002]; People ex rel. Howe v Travis, 18 AD3d 1052, 1052 [3rd Dept., 2005]; Matter of Chaney v Van Guilder, 14 AD3d 739 [3rd Dept., 2005]).

The Court finds that the petitioner failed to exhaust his administrative remedies with regard to his grievance concerning the respondent's alleged refusal to permit him to participate in a sex offender program.

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

> "Parole denied. After a personal interview, record review, and deliberation, this panel finds your release is incompatible with the public safety and welfare. You are currently serving a 28 month hold as a parole violator for possessing a web camera and pornographic images on a computer as well as having an alcoholic beverage at your residence. This is of great concern due to your instant offenses that involve sexual contact with minor aged females. Since your return to prison, you have not completed sex offender therapy to examine your violation behavior. Consideration has been given to your receipt of an earned eligibility certificate and satisfactory behavior. However, due to your poor record on community supervision, deviant pas crime, and need for therapy for those acts, your release at this time is denied. There is a reasonable probability you would not live and remain at liberty without violating the law."

As stated in Executive Law §259-i (2) (c) (A):

> "Discretionary 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. 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; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). 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]). 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]).

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 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 Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; 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 Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). 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 (see, People ex rel. Justice v Russi, 226 AD2d 821 [3rd Dept., 1996]; Matter of Flecha v Russi, 221 AD2d 780 [3rd Dept., 1985]; Matter of Walker v Russi, 176 AD2d 1185 [3rd Dept., 1991] lv dismissed 79 NY2d 897).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd

Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). The Court discerns no due process violation with regard to petitioner's conclusory argument concerning the alleged lack of advance notice of the parole interview and/or his inability to prepare. This is true particularly where, as here, he was provided written notice on January 19, 2006 that he would be appearing before the Parole Board in April 2006.

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

The Parole Board's decision to hold petitioner for 15 months is within the Board's

discretion and was supported by the record (see, Matter of Tatta v State of New York, Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments 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.

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. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: June 8, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition March 2, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 10, 2007, Supporting Papers and Exhibits
3. Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General dated
4. Reply Affirmation of Peter Doret, Esq., filed April 18, 2007, Supporting Papers and Exhibits