September 2021

Decision in Art. 78 proceeding - Gladden, Benjamin (2007-10-30)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of BENJAMIN GLADDEN

Petitioner,

-against-

ROBERT DENNISON, Chair,
New York State Division 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-ST7751 Index No. 3355-07

Appearances: Benjamin Gladden
Petitioner, Pro Se
Lyon Mountain Correctional Facility
3864 Route 374
Lyon Mountain, New York 12952

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Lyon Mountain Correctional Facility, has commenced the

instant CPLR Article 78 proceeding to review a determination of respondent made on January 16, 2006 denying petitioner discretionary release on parole. The petitioner is serving a term of seven years to life for the crime of Criminal Possession of a Weapon, 3rd Degree, which occurred while the petitioner was on parole. Due to his extensive criminal history, the petitioner was sentenced as a persistent and violent felony offender. Among the many arguments set forth in the petition, petitioner contends that the Parole Board's determination was arbitrary and capricious and violated his rights to due process. Petitioner alleges that the Parol Board placed too much emphasis on the serious nature of his crime and his criminal history and not enough on his institutional achievements, which included the completion of Phase III, and ASAT as well as his receipt of an Earned Eligibility Certificate. In doing so petitioner alleges that the respondent violated § 259-i of the Executive Law. Petitioner also claims that the guideline ranges were not properly considered by the parole board and finally, that its decision was too vague and conclusory to provide him with an adequate explanation of why parole was denied.

Addressing a threshold issue, the petitioner, in an affidavit denominated "Motion to Dismiss Pursuant to CPLR § 3211(c)," maintains that respondent's answer was untimely served. The Court, however, by letter dated August 29, 2007, granted the respondent a one week extension to serve his answer, to and including September 7, 2007. Respondent's papers were timely served on August 30, 2007. In view of the foregoing and for the reasons set forth herein below, the Court finds that the petitioner's motion must be denied.

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, accordingly, finds no due process violation.

The arbitrary and capricious argument that petitioner raises requires a little more analysis. It is well established that "[p]arole 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 statutory requirements are set forth in Executive Law §259-i (2) (c) (A) which states that:

> "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]).

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 as well as the Parole Board's decision reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his receipt of a certificate of earned eligibility, his disciplinary record, and his plans upon release. The petitioner's allegations that too much attention was paid to his criminal history and the serious nature of his crime are without merit. 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]). Additionally, 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 [3d Dept., 1985]; Matter of Walker v Russi, 176 AD2d 1185 [3d Dept., 1991] lv dismissed 79 NY2d 897).

With regard to the allegation that the Parole Board's decision was too vague, 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]).

All that is required of the board is that it make its determination within the parameters of Executive Law § 259-i (2) (c) (A). "Where 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).

Here, the record reflects that the board considered the relevant factors when reaching their decision on whether to grant petitioner parole. The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied. Hold 24 months. Next appearance 1/2008. Notwithstanding the Earned Eligibility Certificate, after a review of the record and interview, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release at this time is incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. The decision is based on the following factors: Your instant offense, Criminal Possession of a Weapon 3rd Degree represents a continuation of your criminal history that includes prior convictions for Attempted Criminal Possession of a Weapon 3rd Degree and Attempted Robbery. You were on parole supervision for Attempted Robbery in the 1st Degree when you committed the instant offense. This Panel notes your positive programmatic participation since your last Parole Board appearance, including completion of Phase III and ASAT. You have also incurred approximately two Tier II misbehavior reports since your last

> Parole Board appearance. He's above the guidelines due to sentence structure. Continuous involvement with the criminal justice system. Negative response to past correctional influence. All commissioners concur."

This decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and, as such 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]).

Finally, with respect to petitioner's argument that he has served time in excess of the guideline range (see, 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see, 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

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 that petitioner's motion pursuant to CPLR 3211 (c) be and hereby is denied; and 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: October 30, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Petitioner's Verified Petition dated April 18, 2007, Affirmation, Supporting Papers and Exhibits
2. Respondent's Answer dated August 30, 2007, Affirmation, Supporting Papers and Exhibits
3. Petitioner's Motion to Dismiss Pursuant to CPLR 3211 (c)
4. Petitioner's Reply