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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 13

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In the Matter of the Application of
CARLA LOCKWOOD,

Petitioner,

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
ANTHONY J. ANNUCCI, ACTING COMMISSIONER
and TINA M. STANFORD, CHAIRWOMAN,
BOARD OF PAROLE,

Index No.: 102183/2015

Respondents

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

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MANUEL J. MENDEZ, J.:

In this Article 78 proceeding, petitioner Carla Lockwood seeks to reverse a determination made by respondents New York State Department of Corrections and Community Supervision (DOCCS), Anthony J. Annucci, Acting Commissioner and Tina M. Stamford, Chairwoman of the New York State Board of Parole (Board) (collectively, respondents) denying her parole. Petitioner seeks to be released to parole supervision, or, in the alternative, requests a de novo parole hearing.¹ Respondents answer and oppose the petition.

¹ Although petitioner seeks to be released to parole supervision, "the appropriate remedy for a successful challenge to a parole release determination is annulment of that determination and remand for a new parole release hearing." *Matter of Ifill v Evans*, 87 AD3d 776, 777 (3d Dept 2011).

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is currently incarcerated at Bedford Hills Correctional Facility, located in Bedford Hills, New York. On October 24, 1997, petitioner was convicted of murder in the second degree and was sentenced to a minimum of fifteen years to life.

Petitioner appeared before the Board on April 27, 2015, for the Board to determine whether petitioner could be granted discretionary release from prison. Petitioner participated via video interview and had counsel prepare and submit documents on her behalf.

According to respondents, the Board is a part of DOCCS and consists of "up to 19 members appointed by the Governor and confirmed by the Senate for six-year terms, [and] is tasked primarily with deciding which inmates should be granted discretionary release to the community along with imposing any conditions of release." Answer, ¶ 2. Prior to this interview, petitioner had appeared before the Board in 2011 and 2013 and had been denied parole.

During petitioner's interview, the Board told petitioner that it received the material from her attorney and that it would consider all of the information prior to making its determination. The Board started the interview by listing the documents it received on petitioner's behalf, including the

Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) re-entry risk assessment instrument (COMPAS assessment).

During the interview, the Board mentioned that it did not receive the sentencing minutes. The Board stated that it had an affidavit requesting the minutes, however the minutes had not been provided because the court reporter who took the stenographic notes is no longer employed by the court system. It stated, "[y]ou were there at the time of sentencing, so if there's anything that was said that you think would be important for us to know, you can let us know during the interview." Respondents' exhibit C at 3.

The Board asked petitioner several questions regarding the underlying crime and situation that resulted in petitioner's incarceration. Petitioner acknowledged that she had been using drugs and was mentally ill at the time of the crime. She briefly discussed the crime, with the Board stating the following:

"She was a toddler. You left her, confined her to her crib for over a year, stopped feeding her and saw her slowly deteriorate, weaken and ultimately starve to death. You didn't seek any medical attention for her, and records in the file also indicate that when you knew she was dead, you waited several hours to call 911."

Id. at 4-5.

Although petitioner prepared a statement prior to her interview, the Board asked her have the counselor fax it over and

to tell the Board what she would "like us to glean from the essence of the letter." *Id.* at 8. Petitioner explained that, at the time of her crime she was mentally ill, but that she has worked hard to try and understand why and how she could commit such an act. She noted that she has completed "MICA" (Mentally Ill Chemical Abuse) programs and therapy and that she has changed. The Board mentioned that it had a list of all the programs that petitioner completed and participated in, and it asked petitioner during the interview to name the most significant program for her.

Petitioner described her experiences with a rehabilitation program and then, when asked if she had any additional comments with respect to the programs, she stated, "[n]o ma'am. It's self explanatory." *Id.* at 9.

The Board discussed petitioner's plans if she were to be released. Petitioner testified that she is expecting to be deported to Belize after her release from prison. She explained that Belize is her native country and that she has relatives still living there. Petitioner stated that her lawyer spoke to agencies in Belize and that, upon petitioner's arrival there, petitioner will be provided with housing, meals, clothing, counseling and help searching for jobs.

After the interview concluded, the Board deliberated and released its determination on the same date. The Board denied

parole and advised petitioner that she could reapply for parole in two years. The Board's determination stated that, if petitioner were to be released at this time, her 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." *Id.* at 12. The Board explained that it considered the "required statutory factors," including petitioner's risk to society, her institutional adjustment, rehabilitation efforts, release plans and needs for successful re-entry into the community. It also considered petitioner's family support, personal statement, and her "well prepared parole packet, IPA, ART, AVP, letters of support, letters from staff, deportation order and certificates of accomplishment." *Id.* at 13. Nonetheless, the Board found that petitioner's release at this time was not appropriate, because petitioner's "callous disregard" for her young child was more compelling.

Petitioner, through counsel, appealed this determination to the appeals unit of the Board. In pertinent part, petitioner claimed that her right to be heard was compromised because she was not permitted to read her personal statement. Petitioner further alleged that the Board made multiple procedural errors, including not having the sentencing minutes, relying on information not provided to petitioner and using a COMPAS assessment with erroneous information. In addition, petitioner

argued that the Board did not weigh all of the statutory factors or provide a detailed reason for the denial.

On September 24, 2015, the appeals unit affirmed the April 27, 2015 determination. In pertinent part, the appeals unit held that any procedural error raised now, that had not been raised at the interview, had been waived.

Petitioner then commenced this Article 78 proceeding, challenging the April 27, 2015 determination. According to petitioner, the Board's decision to deny parole was "arbitrary and capricious because it failed to consider all of the statutory factors since it ignored Ms. Lockwood's mental health and substance abuse treatment and support of the victim's family." Petition at 6.

Petitioner provides numerous reasons why she believes she is entitled to a de novo hearing. Among other things, petitioner alleges that the Board's determination was lacking in detail and impermissibly conclusory, and that it did not explain its reasons for denying parole. In pertinent part, petitioner believes that, in light of the fact that her mental health and substance abuse issues were connected to her crime, the Board did not give these issues due consideration in the determination. Counsel writes, "[t]oday, she is of sound mind and does not currently have active symptoms of mental illness, and her drug dependency on cocaine is in sustained remission." Petition at 33.

According to petitioner, the Board, although required to do so, did not explain why petitioner was not rehabilitated and how she would pose a risk to society. It allegedly impermissibly relied solely on the seriousness of petitioner's crime.

Petitioner claims that the Board's determination that she has not been rehabilitated is inconsistent with its own reports. The COMPAS assessment, for example, assessed petitioner at the lowest risk of recidivism. However, according to petitioner, the Board failed to explain how her release would be incompatible with the welfare of society. Moreover, as petitioner is being deported to Belize and provided the Board with detailed and realistic plans for re-entry, petitioner claims that it was arbitrary and capricious when the Board failed to explain how her release would be incompatible with the welfare of society.

Petitioner claims that, through her personal statement, she was able to explain to the Board insight into her crime and her remorse. She lists several programs she has participated in and states that she has been given leadership roles in them as well. However, despite this remorse and insight into the past behaviors, the Board failed to explain how the incarceration petitioner already served would not suffice.

Petitioner further alleges that, although victim impact statements were submitted to the Board, there is no evidence in the transcript or the determination that the Board considered

these statements.

The bulk of petitioner's arguments center around the alleged failure of the Board to weigh all of the relevant statutory factors and the Board's alleged failure to explain its determination to deny parole. However, petitioner also contends that there were procedural irregularities involved in her hearing and subsequent determination. According to petitioner, the procedural errors include the following, in pertinent part:

- "Petitioner was allegedly not entitled to a complete parole interview because she was not allowed to read her personal statement at the hearing.
- The Board stated during the interview that it did not have access to the sentencing minutes, however petitioner herself had the transcript of the minutes except for one missing page.
- At the hearing, the Board referred to an OMH report, however petitioner did not receive this report prior to her interview, despite her request for it.
- Petitioner did not receive certain portions of her parole file that she believed she was entitled to, such as her complete unredacted COMPAS assessment, page two of the ISR/Parole Report/Crime/Sentence Information and her deportation recommendation.
- The COMPAS assessment contained errors, including labeling petitioner as 'max out' on her prison release status when petitioner is eligible for parole. The history of violence section was inaccurately placed in the criminogenic needs scales, and '[b]y placing the category within the criminogenic needs section, the COMPAS suggests that Ms. Lockwood can change this score when in fact it is based on a wholly static factor--her crime--that cannot be

changed.' "

Petition at 46.

Respondents argue that, contrary to petitioner's contentions, the Board did consider all of the statutory factors during the interview, and that the decision is based on permissible factors. Moreover, among other things, the Board is not required to discuss each factor during the interview, and that failing to discuss each factor does not provide a basis to disturb a determination. According to respondents, it is within the Board's discretion to decide if one factor deserves more weight than another and it is within the Board's discretion to emphasize that the violent nature of the crime warrants denial of parole. Respondents conclude, "[p]arole release is a discretionary function of the Board, and petitioner has not met her burden of demonstrating that the Board abused its discretion in denying her release, or that its determination was arbitrary and capricious." Answer, ¶ 38.

Respondents further maintain that the Board did give petitioner sufficient rationale for its denial. In addition, although petitioner did not read her personal statement, she was asked to relay the meaning of her statement, in her own words, to the Board. Moreover, although petitioner believes that she is entitled to release, the "Board's determination that the inmate's achievements are outweighed by the severity of the crime is

properly within the Board's discretion." *Id.*, ¶ 50.

In its answer, respondents maintain that any procedural objections are waived as petitioner did not address them during her interview. These include petitioner's inability to read her personal statement, the lack of the Board's consideration of the sentencing minutes and the errors in the COMPAS assessment.

In any event, even if the issues were raised, respondents claim that they are de minimis and had no impact on the hearing, as the Board, for example, knew that petitioner was eligible for parole despite the COMPAS listing her as "max out." In addition, the Board's lack of consideration of the sentencing minutes do not render the determination irrational and petitioner was not prejudiced as a result.

DISCUSSION

In the context of the judicial review of an agency determination, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006); see CPLR 7803 (3). When reviewing the Board's decision to release a prisoner on parole, "[j]udicial intervention is warranted only when there is a showing of irrationality bordering on impropriety. Thus, we

review whether the Board's decision to deny parole was arbitrary or capricious [internal citations and quotation marks omitted]." *Matter of Silmon v Travis*, 95 NY2d 470, 476 (2000).

"It is well settled that parole release decisions are discretionary and will not be disturbed as long as the statutory requirements of Executive Law 259-i are satisfied." *Matter of Matos v New York State Bd. of Parole*, 87 AD3d 1193, 1194 (3d Dept 2011). Pursuant to Executive Law § 259-i (2) (c) (A), when determining whether or not a prisoner should be released on parole after the minimum period of imprisonment has been met, the Board must consider the following factors:

"(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . . (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 while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following

arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement."

The statute explains that discretionary release is not to be granted "merely as a reward for good behavior." Executive Law § 259-i (2) (c) (A). Among other things, release cannot be "incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." *Id.*

Here, the record established that the Board considered all of the relevant statutory factors prior to denying petitioner's release. The transcript and determination indicate that the Board discussed the crime with petitioner, including the seriousness of the offense. The Board addressed petitioner's release plans, including her proposed deportation. It discussed petitioner's rehabilitative efforts and institutional adjustment, including program participation and accomplishments. The Board noted that petitioner had been doing well and had received letters of support and letters from staff.

Although petitioner believes that the Board placed an undue weight on the seriousness of her crime, the Board is not required to give each statutory factor equal weight and may use its discretion to place great weight on the serious nature of the crime. *Matter of Matos v New York State Bd. of Parole*, 87 AD3d

at 1194.

In addition, petitioner argues that the Board's determination does not provide enough information for the court to evaluate why it denied parole. Executive Law § 259-i (2) (a) (i) states that, if parole is not granted, the inmate shall receive in writing, "the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." However, the record establishes that the Board considered the factors and provided a reason for the denial, thereby satisfying Executive Law § 259-i (2) (a) (i).

This matter is similar to *Matter of Kozlowski v New York State Bd. of Parole* (108 AD3d 435 [1st Dept 2013]), where the Court found that the Board's denial of parole release was rational when it considered the required statutory factors and set forth its reason for denial, which included the conclusion that "petitioner's release would tend to deprecate the seriousness of the instant offense(s) and undermine respect for the law." *Id.* at 436. The Court further noted that, "[w]hile less detailed than it might be, [the determination] is not merely conclusory [internal quotation marks and citations omitted]." *Id.*

Moreover, even though petitioner alleges that the Board did not consider her rehabilitative efforts and her current mental status, "even when a petitioner's institutional behavior and

accomplishments are exemplary, the Board may place particular emphasis on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered [internal quotation marks omitted]." *Matter of Hamilton v New York State Div. of Parole*, 119 AD3d 1268, 1272 (3d Dept 2014); see also *Matter of Anthony v New York State Div. of Parole*, 17 AD3d 301, 301 (1st Dept 2005) ("Respondent properly took into account the extremely serious nature of petitioner's crimes, which was not outweighed by his apparently exemplary record of accomplishments while incarcerated [internal citation omitted]").

Petitioner further claims that, although the Board was required to consider statements from the victim's family, nothing in the hearing record demonstrates that it did. Petitioner states that she provided statements from the victim's siblings. During the interview the Board informed petitioner that it had received the packet from her attorney, and that it would review everything. Although the Board is required to consider all of the factors set forth in reviewing a request for parole release, it is not required to "specifically discuss every factor considered in making its decision." *Matter of Johnson v New York State Bd. of Parole*, 16 AD3d 750, 751 (3d Dept 2005).

Finally, petitioner argues that the Board's findings are inconsistent. According to petitioner, as she has a

comprehensive post release plan, her release should not be incompatible with the welfare of society. In addition, petitioner claims that the Board did not give due consideration to her current mental health and sobriety. However, although petitioner and her supporters may believe she deserves parole release at this time, "[i]n New York, the Parole Board holds the power to decide whether to release a sentenced prisoner on parole." *Matter of Silmon v Travis*, 95 NY2d at 476.

The court's "role is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record." *Matter of Comfort v New York State Div. of Parole*, 68 AD3d 1295, 1296 (3d Dept 2009). The record establishes that the Board considered the statutory factors prior to denying petitioner's release. As its denial is supported by the record and does not display "irrationality bordering on impropriety," [internal citation omitted]" the court will not disturb the Board's determination. *Id.* at 1297.

As noted by both respondents and the appeals unit, if petitioner had concerns about the interview itself or records involved with the process, she had a full opportunity to raise these issues at her interview and preserve them on the record. See e.g. *Matter of Vanier v Travis*, 274 AD2d 797, 798 (3d Dept

2000) (Petitioner failed to properly preserve his objection to the use of two-way television for his interview because "no objection was expressed at the parole hearing").

Applying the above law to the case at hand, objections not made to the Board at the time of petitioner's interview, including but not limited to issues with her personal interview, the COMPAS assessment, the sentencing minutes, the records allegedly owed to petitioner but not provided to her, among other procedural errors, have been waived. In any event, the court finds no basis to vacate the determination as a result of these alleged procedural errors, as the record reflects that petitioner suffered no prejudice as a result.

Petitioner did not preserve the argument that her COMPAS assessment contained erroneous information. Regardless, the Board noted from the COMPAS assessment that petitioner was a low risk for re-offending and "there is nothing in the record to suggest that the erroneous information served as a basis for the decision to deny [her] release." *Matter of Sutherland v Evans*, 82 AD3d 1428, 1429 (3d Dept 2011). As a result, the court will not order a de novo hearing on this basis.

Executive Law § 259-i (2) (a) (i) provides that "a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he should be paroled" Petitioner claims that she was denied a personal

interview pursuant to Executive Law § 259-i (2) (a) (i) when she was not permitted to read her personal statement into the record. Petitioner did not preserve this argument for review. Nonetheless, the record reflects that petitioner was advised to use her own words to explain her personal statement to the Board and the Board stated that it had read her personal statement. Accordingly, the court is not persuaded that the Board did not "personally interview" petitioner.

Lastly, petitioner did not preserve her argument regarding the sentencing minutes and the Board's statement that it did not have the minutes, despite petitioner having a copy herself. Nonetheless, the minutes are part of the record before this court and "do not indicate that the sentencing court made any recommendations with respect to parole." *Matter of Ruiz v New York State Div. of Parole*, 70 AD3d 1162, 1163 (3d Dept 2010). As a result, any error made by the Board in rendering a determination without the minutes was "harmless," and the determination will not be disturbed on this basis. *Id.*; see also *Matter of Matos v New York State Bd. of Parole*, 87 AD3d at 1194 ("while it is unclear whether the Board considered the sentencing minutes, any error in this regard was harmless given that the sentencing minutes do not disclose that the sentencing court made any recommendations concerning parole").

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

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: April 26, 2016

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A handwritten signature in black ink, appearing to be 'M. Mendez', is written over a horizontal line.

MANUEL J. MENDEZ
J.S.C.

J.S.C.

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