September 2021

Decision in Art. 78 proceeding - Maida, John (2009-12-04)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JOHN MAIDA,

Petitioner,

-against-

ANDREA D. EVANS, Chair of the
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 # 01-09-ST0570 Index No. 6158-09

Appearances: John Maida
Inmate No. 83-B-1881
Petitioner, Pro Se
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13402-3600

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The Capitol
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Marcy Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated September 23,

2008 to deny petitioner discretionary release on parole. The petitioner is serving a term of fifteen years to life on a conviction of murder in the second degree. He was sentenced in July 1983. This is his seventh appearance before the Parole Board. Among the arguments set forth in the petition, petitioner contends that the Parole Board relied upon incorrect information in petitioner's prison records which in his words "demonstrat[ed] their focus on a hate crime". The incorrect information is with respect to his race/ethnicity, which was listed on the Department of Correctional Services ("DOCS") website as Black, when he is actually Caucasian.[1] He argues that he has been the victim of racial profiling extending as far back as his criminal prosecution. The petitioner maintains that his prison record incorrectly mentions a post-conviction assault in 1989. He argues that the Parole Board took an adversarial position to him during the parole interview. As a part of this argument he asserts that the inmate status report incorrectly indicates that the District Attorney provided an "official statement" with respect to his release.[2] The petitioner further contends that the Parole Board improperly considered a letter from Blue Knights Motorcycle Club. He criticizes the Parole Board for being biased against him.

The petitioner argues that the Parole Board's decision is not supported by fact in that there is no evidence to support its conclusion that his release is incompatible with the welfare of society, or that his release would tend to deprecate the seriousness of the instant offense and undermine respect for the law. The petitioner asserts that the Parole Board failed to

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[1]The respondent informs the Court that this has since been corrected.

[2]The petitioner indicates that while the District Attorney apparently wrote a letter opposing his release in 2001, no letter was received from the District Attorney in connection with petitioner's 2008 re-appearance before the Parole Board.

adequately consider his institutional accomplishments. He maintains that the Parole Board improperly considered his prior history of drug use, and that this violated the Americans With Disabilities Act (see 42 USCS § 12201 et seq.) and the Equal Protection Clause of the United States and New York State Constitution. As a part of the foregoing argument he points out that he has taken and completed the ASAT (Alcohol and Substance Abuse) program. He maintains that his drug addiction is a disability, and that he is being discriminated against by reason of his disability. The petitioner contends that the Parole Board failed to consider the proper statutory factors, and also considered impermissible factors, in reaching its determination. As a part of the latter argument he points out that he earned his GED degree while incarcerated; that he has received college credits; and that his inmate record includes many vocational and therapeutic achievements. He indicates that he has received numerous letters in support of his release, that he has a family and job waiting for him. He maintains that the Parole Board improperly gave too much weight to the crime for which he is incarcerated, to the exclusion of all other factors. In his view, the Parole Board undertook to re-sentence him to another term of imprisonment.

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

> "Denied 24 months. Next appearance September 2010. Following a careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered. Your instant offense in Yonkers, in January, 1982 involved your fatally stabbing a male victim. Your criminal history reflects a prior weapon related offense. Your institutional programming demonstrates progress and

> achievement which is noted to your credit. Your disciplinary record reflects one Tier 3 report. You have served SHU time. Your discretionary release, at this time, would thus not be compatible with the welfare of society at large, and would tend to deprecate the seriousness of the instant offense and undermine respect for 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 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]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (Matter of De La Cruz v Travis, supra). 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. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his disciplinary record, and his plans upon release. During the parole interview Parole Commissioner Ludlow read extensively from the minutes of petitioner's sentencing. In addition, Commissioner Ludlow read from a very favorable letter received from the sentencing judge (which recommended that the petitioner be released). 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 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 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'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]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept.,

2008]). 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 first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable

classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir., 2001]). In addition, because "New York courts addressing a state equal protection claim will ordinarily afford the same breadth of coverage conferred by federal courts under the US Constitution in the same or similar matters" (Brown v State of New York, 45 AD3d 15, 20-21 [2007 [3rd Dept., 2007], quoting Brown v State of New York, 9 AD3d 23, 27 [2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit.

The Parole Board's decision to hold petitioner for the maximum period (24 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).

Petitioner's argument with respect to the alleged erroneous information concerning his race and/or ethnicity, posted on the DOCS website, has no merit. There is no evidence that members of the Parole Board had viewed and/or were aware of the incorrect entry. In addition, the inmate status report correctly indicated petitioner's race. Lastly there is no indication in either the Parole Board determination, or in the transcript of the parole

interview, that the petitioner's race and/or ethnicity factored into the determination, or that the Parole Commissioners viewed petitioner's murderous assault as a hate crime.

To the extent that petitioner alleges that his inmate record contains inaccurate information, that claim is not the proper subject of this proceeding. Petitioner's challenge to the accuracy of his institutional records should be made pursuant to the procedures set forth in 7 NYCRR part 5 (see Matter of Salahuddin v Goord, 64 AD3d 1091, 1092 [3rd Dept., 2009]; Matter of Rivera v Joy, 50 AD3d 1333, 1334 [3rd Dept., 2008]; Matter of Rivera v Selsky, 49 AD3d 1115, 1115 [3rd Dept., 2008])

The Court has reviewed petitioner's remaining arguments and contentions, including those under the Americans With Disabilities Act 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.

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 records submitted for *in camera* review.

Accordingly, it is

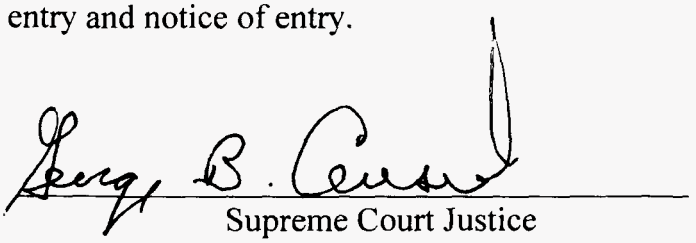
ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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: December 4, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated July 24, 2009, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated September 22, 2009, Supporting Papers and Exhibits