September 2021

# Decision in Art. 78 proceeding - Manning, Paul (2007-10-01)

[*1]

| Matter of Manning v New York State Div. of Parole |
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| 2007 NY Slip Op 51954(U) [17 Misc 3d 1113(A)] |
| Decided on October 1, 2007 |
| Supreme Court, Franklin County |
| Feldstein, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on October 1, 2007

**Supreme Court, Franklin County**

**In the Matter of the Application of Paul Manning, Petitioner,**

**against**

**New York State Division of Parole, Respondent.**

2007-0312

S. Peter Feldstein, J.

This proceeding pursuant to Article 78 of the CPLR was originated by the petition of Paul Manning, verified on December 22, 2006, and stamped as filed in the Franklin County Clerk's Office on February 28, 2007. Petitioner, who is now an inmate at Gowanda Correctional Facility, is challenging a March 2006, determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on March 6, 2007. The Court has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on April 20, 2007, together with a Letter Memorandum of that date. Petitioner's Reply, verified on May 8, 2007, was stamped as filed in the Franklin County Clerk's Office on May 17, 2007.

Petitioner was sentenced in Supreme Court New York County on February 10, 2004, to two indeterminate terms of 3 to 9 years for his conviction, by plea, of Use of a Child in a Sexual Performance, and to three indeterminate terms of 1 and 1/3 to 4 years upon his conviction, by plea, of Possession of a Sexual Performance by a Child. All sentences on the two indictments were to run concurrently. Petitioner was also on the same date and by the same Court sentenced to two indeterminate terms of 2 and 1/3 to 7 years each upon his conviction, by plea, of two counts of Promoting a Sexual Performance by a Child , and to two indeterminate terms of 1 and 1/3 to 4 years upon his conviction, by plea, of Possessing a Sexual Performance by a Child. All terms were to be concurrent.

Petitioner appeared before the Parole Board on March 7, 2006. The Parole Board denied petitioner's release and held him for 24 months. The Parole Board's reasons for denial are as follows:

> "PAROLE IS DENIED. YOU CURRENTLY SERVE TWO CONTROLLING SENTENCES OF 3 TO 9 YEARS EACH UPON YOUR CONVICTIONS FOR TWO COUNTS OF THE USE OF A CHILD IN A SEXUAL PERFORMANCE. YOU ALSO SERVE LESSER SENTENCES UPON CONVICTIONS FOR MULTIPLE COUNTS OF POSSESSION OF A SEXUAL PERFORMANCE BY [*2]A CHILD AND PROMOTING A SEXUAL PERFORMANCE BY A CHILD. YOU INDUCED A CHILD UNDER THE AGE OF 17 YEARS TO ENGAGE IN A SEXUAL PERFORMANCE AND FOLLOWING INVESTIGATION WERE FOUND TO HAVE TRADED INTERNET CHILD PORNOGRAPHY DEPICTING AN 8 YEAR OLD ENGAGING IN SEXUAL ACTS. THIS CONDUCT DEOMONSTRATES [SIC] EXTREME SEXUAL DEVIANCE AS WELL AS A DEPRAVED INDIFFERENCE FOR THE WELFARE OF A VULNERABLE CHILD.THEREFORE, WHILE THE PANEL NOTES YOU HAVE RECEIVED AN EARNED ELIGIBILITY CERTIFICATE THE PANEL CONCLUDES THAT IF YOU ARE RELEASED AT THIS TIME THERE EXISTS A REASONABLE PROBABILITY THAT YOU WILL NOT LIVE AND REMAIN AT LIBERTY WITHOUT FURTHER VIOLATIONS OF LAW. ALL FACTORS CONSIDERED, INCLUDING THIS INTERVIEW AND THE

DOCUMENTS YOU SUBMITTED, SPECIFICALLY AN OFFICIAL BUSINESS PLAN' FOR A PROPOSED COMPUTER BASED BUSINESS YOU ENTITLED TEAMPOWERSERJ.COM' WHEREIN YOU DETAIL VARIOUS WAYS IN WHICH YOU HOPE TO PURSUE ON-LINE ACTIVITIES, AND YOUR INSISTENCE AT THE INTERVIEW THAT YOUR COMPUTER ACCESS NOT BE COMPLETELY RESTRICTED AT YOUR RELEASE, INDICATE CLEARLY TO THE PANEL THAT YOU POSSESS A STAGGERING LACK OF INSIGHT INTO THE ENORMOUS RISK THAT YOU PRESENT TO COMMUNITY SAFETY. THE LIKELIHOOD OF RECIDIVISM ON YOUR PART IS EXTREMELY HIGH AND YOU STAND TO BENEFIT FROM THE COMPLETION OF INTENSIVE SEX OFFENDER COUNSELING, WHICH TO DATE YOU HAVE NOT DONE. YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY."

Petitioner appealed the denial and the Appeals Unit failed to issue its findings and recommendations within the time period set forth in 9 NYCRR 8006.4(c). This proceeding ensued.

Petitioner alleges that the parole denial determination was arbitrary and capricious; that the Board placed undue emphasis on his business plan which did not contain any illegal content; that the Board incorrectly stated that he insisted that computer access not be completely restricted at his release; that the Board deliberately disregarded what he has accomplished including an earned eligibility certificate; that the Board's conclusion that the likelihood of recidivism is high is not supported by the record; and that the Board was biased due to the nature of his crime.

Respondent contends that its actions herein were in all respects legal and proper and done in accordance with law; that the decision was not affected by an error of law or arbitrary and capricious or an abuse of discretion; and that its decision was not made in violation of lawful procedure.

Executive Law §259-i(2)(c)(A) provides, in relevant part, as follows: "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 [*3]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 . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . ." In addition to the above, in cases such as the one at bar where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate's prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a). Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5)) unless there has been a showing of irrationality bordering on impropriety. *See Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

Petitioner's receipt of an earned eligibility certificate does not automatically entitle him to discretionary parole release. *Dorman v. New York State Board of Parole*, 30 AD3d 880. "Notwithstanding the receipt of a certificate of earned eligibility, the Board is justified in denying parole release where it concludes, based upon a review of the relevant statutory factors, that the inmate's release is not compatible with the welfare of society or that the inmate will not be able to live and remain at liberty without violating the law, if released." *Morrero v. Dennison*, 19 AD3d 960, 961 (citations omitted).

Petitioner's contention that he has been unable to get into a program for sex offenders does not require that he be released on parole. In *Pitts v. Dennison*, 40 AD3d 1184, the Court upheld a denial of parole where the petitioner had participated in the sex offender program and had a "relatively clean disciplinary record."

Respondent considered the appropriate statutory factors set forth in Executive Law § 259-i, including not only the nature of petitioner's crimes, but also his fairly clean prison disciplinary record, receipt of a certificate of earned eligibility and post release plans. Since petitioner's crimes involved the use of a computer, this Court cannot conclude that the Board's consideration of petitioner wanting

to use a computer upon his release to be improper. Inasmuch as the Board's decision does not exhibit "irrationality bordering on impropriety" (*Matter of Silmon,* supra; quoting *Matter of Russo,* supra), this court finds no reason to disturb the determination by the Board of Parole. *See, Matter of Burress v. Dennison,* 37 AD3d 930.

It is, therefore, the decision of the Court and it is hereby

**ADJUDGED**, that the petition herein is dismissed.

**Dated:**October 1, 2007 at

Indian Lake, New York._____

S. Peter Feldstein

Acting Supreme Court Justice

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