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Matter of Nieves v Stanford
2015 NY Slip Op 30264(U)
February 5, 2015
Supreme Court, Franklin County
Docket Number: 2014-539
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

_____X

In the Matter of the Application of
JEFFREY NIEVES, #96-A-5573,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0297.56
INDEX # 2014-539
ORI #NY016015J

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jeffrey Nieves, verified on July 2, 2014 and filed in the Franklin County Clerk's office on July 15, 2014. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the October 2013 determination denying him discretionary parole release and directing that he be held for an additional 18 months. The Court issued an Order to Show Cause on July 25, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on October 14, 2014 and supported by the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated October 14, 2014 as well as by the Letter Memorandum of Dennis J. Lamb, Esq., Assistant Counsel, New York State Board of Parole, dated October 7, 2014. The Court has also received and reviewed Petitioner's Affidavit in Reply to Respondent's Verified Answer, sworn to on October 28, 2014 and filed in the Franklin County Clerk's office on November 4, 2014.

On August 13, 1996, petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 15 years to life upon his conviction of the crime of Murder 2°. On October 10, 1996 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2½ to 5 years upon his conviction of the crime of Attempted Robbery 2°. The New York County sentencing court directed that its sentence run concurrently with respect to the previously-imposed Kings County sentence. After having been denied discretionary parole release on two prior occasions petitioner made his third appearance before a Parole Board on October 2, 2013[1]. Following that appearance a decision was rendered denying him discretionary parole release and directing he be held for an additional 18 months. The parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, YOUR 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.
>
> THE BOARD HAS CONSIDERED YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO SOCIETY, REHABILITATION EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS HAVE ALSO BEEN CONSIDERED. MORE COMPELLING, HOWEVER, IS YOUR PATTERN OF DANGEROUS BEHAVIOR WHICH INCLUDES THREE FELONIES AND A PRIOR STATE TERM OF INCARCERATION.

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[1] Petitioner actually appeared before Parole Boards on three occasions prior to October 2, 2013. Only two of those appearances, however, were regularly scheduled appearances (October 2009 initial appearance and October 2011 reappearance). The third appearance (May 2013) was an appearance for *de novo* parole release consideration apparently necessitated by a judicial determination vacating the parole denial determination following petitioner's October 2011 reappearance.

> YOU WERE UNDER PAROLE SUPERVISION FOR A ROBBERY-RELATED OFFENSE AT THE TIME OF THE I.O. [Instant Offense].
>
> DURING THE INTERVIEW, YOU MINIMIZED YOUR ACTIONS AND DID NOT GIVE A CREDIBLE EXPLANATION OF THE I.O., WHICH RESULTED IN YOU SHOOTING AN UNARMED VICTIM IN THE BACK, CAUSING HIS DEATH. YOUR EXPRESSION OF THE CRIME EXHIBITED A LACK OF FULL INSIGHT INTO YOUR MOTIVATION FOR THIS HEINOUS CRIME.
>
> THE BOARD NOTES THE POSITIVE LETTER SUBMITTED FROM THE DISTRICT ATTORNEY, YOUR WELL-PREPARED PAROLE PACKET, LETTERS OF SUPPORT, GOOD WORK AS A PEER EDUCATOR, AND OTHER POSITIVE PROGRAM ACCOMPLISHMENTS.
>
> THE BOARD ALSO RECOGNIZES GROWTH AND IMPROVED ADJUSTMENT.
>
> ALL FACTORS CONSIDERED, YOUR RELEASE AT THIS TIME IS NOT APPROPRIATE."

The document perfecting petitioner's administrative appeal from the October 2013 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on November 8, 2013. The Appeals Unit, however, failed to issue its findings and recommendation within the four month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 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 the law. In making the parole release decision, the procedures 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 interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (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 presentence 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 . . ."

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 Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

One portion of the petition is focused on the assertion that the parole denial determination was improperly based solely on the nature of the crimes underlying petitioner's incarceration, as well as his prior criminal record, without adequate consideration of other relevant statutory factors. A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d

903, *Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . 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. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Inmate Status Report (October 2013 Reappearance Report) and transcript of petitioner's October 2, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's therapeutic/vocational programing records, COMPAS ReEntry Risk Assessment Instrument, partial sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crimes underlying petitioner's incarceration and his prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. Indeed, before the October 2, 2013 Parole Board appearance was concluded one of the presiding commissioners inquired of petitioner as follows: "All right, sir, is there anything that we haven't covered here today that you would like to add?" Petitioner responded as follows: "Basically we went through everything, but I have an issue with this crime particularly. Because like you said, it's never going to go

. . . away, no matter if I stay here the rest of my life, or I'm home supervision. I have to keep up what I'm doing and I have to find some type of forgiveness for what I did. This is just the first step in my forgiveness, talking about my crime. So I have to realize that. And I know this is forever. It weighs down hard on me and I'm just going to keep doing what I got to do. Thank you for listening to me."

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration, committed while at liberty under parole supervision, as well as his prior criminal record. *See Thompson v. New York State Board of Parole,* 120 AD3d 1518, *Shark v. New York State Division of Parole Chair,* 110 AD3d 1134 *lv denied* 23 NY3d 933 and *Dalton v. Evans,* 84 AD3d 1664.

Citing *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, petitioner specifically argues that in order to sustain a parole denial determination " . . . there must be a showing of some aggravating factors, and although the Nature of the Crime needs to be considered, it should not be a determining factor." (Emphasis in original). In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and

fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

This Court (Supreme Court, Franklin County) first notes that although the nature of the crime underlying Mr. King's incarceration was somewhat similar to the nature of the crime underlying the incarceration of the petition in the case at bar, Mr. King had no prior contacts with the law (*id* at 426) while the petitioner has multiple felony convictions and committed the instant offense while at liberty under parole supervision. Petitioner's Parole Board was thus prompted to underscore his "PATTERN OF DANGEROUS BEHAVIOR . . ." This distinguishing factor might, in and of itself, meet the First Department's requirement that a parole denial determination be supported by aggravating circumstances beyond the inherent seriousness of the underlying crime. In any event, however, in July of 2014 the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State*

Division of Parole, 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2] (1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, 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 (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in

[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

> accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id*. [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

This Court therefore finds petitioner's reliance on the decision of the Appellate Division, First Department, in *King* to be misplaced.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall ". . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[3] To the extent petitioner argues that the Parole Board failed to adopt rules or regulations implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of a certain October 5, 2011 memorandum from Andrea W. Evans, then Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011 amendments to Executive Law §259-c(4). *See Partee v. Evans*, 117 AD3d 1258, *lv denied* 2014 NY Slip Op 82439, and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903.

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[3] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

Petitioner also argues that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing a new violent felony offense, for rearrest and/or for absconding. This Court notes, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the nature of the underlying crime and prior criminal record. *See Rivera v. New York State Division of Parole,* 119

AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Petitioner also argues that DOCCS " . . . staff failed to prepare a new Inmate Status Report (ISR), and the Board relied on a [sic] ISR that was more than two years old . . . The ISR that was used states that petitioner was interviewed on 8/22/13, however if he was, then the erroneous information that petitioner had dependant children would not have been in the report, because petitioner never had any children, although this was harmless, still it [the ISR] lacked all the in-house positive accomplishments. Petitioner is a [sic] ever changing role model for the inmate population, and that should have been recognized." (Reference to exhibit omitted).

A review of the record in this proceeding reveals that an ISR dated August 13, 2009 was prepared in anticipation of petitioner's initial (October 2009) Parole Board appearance. A second ISR, dated September 28, 2011, was prepared in anticipation of petitioner's October 2011 Parole Board reappearance. A third ISR, dated April 22, 2013 was prepared in anticipation of petitioner's May 2013 *de novo* Parole Board reappearance. Finally, a fourth ISR, dated September 24, 2013, was prepared in anticipation of petitioner's regular October 2013 Parole Board reappearance. Petitioner is thus incorrect in his assertion that the Board relied upon an ISR that was more than two years old at the time he was re-considered for discretionary parole release in October of 2013[4].

[4] The Court finds no reference to any "dependant children" either the initial ISR dated August 13, 2009 or the ISR dated September 28, 2011, prepared in anticipation of petitioner's October 2011 Parole Board reappearance. In both of those earlier ISRs, under the heading "SUPERVISION NEEDS," it was simply stated that petitioner would need to work to support himself. The Court does note, however, that in both the ISR dated April 22, 2013 and the ISR dated September 24, 2013, under the heading "SUPERVISION NEEDS," it is stated that "[s]ubject will need to work to support himself and his dependant children." The "dependant children" language, however, appears to be merely boilerplate language as there is no reference anywhere else in the record with respect to any alleged "dependant children" of petitioner. In any event, as noted by petitioner, any error in this regard is harmless.

Notwithstanding the foregoing, the Court nevertheless examined petitioner's assertion that the relevant ISR(s) failed to reference all of his "in-house positive accomplishments." Under the "INSTITUTIONAL ADJUSTMENT" heading in the original ISR dated August 13, 2009 the following was stated: "The subject was received into the corrections system in 9/96. Over the course of time, he has successfully completed GED studies, receiving his GED in 1997. In addition, he has participated in ART [Aggression Replacement Training] Phase II of Transitional Services, and completed a vocational Barber and Beauty Stylist Certification course. Work assignments have included several months in facility barber shops, ground maintenance laborer, and porter positions. In addition, Nieves has worked in food service, commissary, and administrative clerk assignment, and laundry. Five months were also spent in a welding program. At that [sic] time of interview, the subject was engage in ASAT [Alcohol and Substance Abuse Treatment] and again assigned as a porter." Under the "INSTITUTIONAL ADJUSTMENT" heading in the ISR dated September 28, 2011 it was noted that since his last appearance petitioner " . . . COMPLETED ASAT AND HAS HELD EMPLOYMENT RELATED TITLES AS A PROGRAM AIDE, PORTER AND LAUNDRY OPERATOR." Under the same heading in the April 22, 2013 ISR it was stated that petitioner " . . . had completed the ASAT program and held titles related as a Program Aide, Porter and Laundry Operator. Subject was not refusing any programing at that time." Finally, in the most recent September 24, 2014 ISR, again under the "INSTITUTIONAL ADJUSTMENT" heading, it was stated that petitioner " . . . is continuing to work as an IPA [Inmate Program Associate] in Transitional Services." Under a separate heading in the September 24, 2013 ISR it was noted that petitioner was interviewed on August 22, 2013 " . . . and is requesting to make a statement at his hearing."

During the course of the October 2, 2013 Parole Board reappearance interview there was significant discussion with respect to petitioner's programing record as follows:

"Q [Parole Commissioner]: Let's now talk about your efforts towards rehabilitation. Point out to me-and I have a list of all your programs you have done-they are all in the file. I have also the certificates of completion you submitted in your parole packet that I reviewed and you did a nice job on your letter you wrote to the board on your personal statement, so we thank you for that, for highlighting some of your rehabilitative efforts in this letter, also talking about your background and the fact you would like to take respondability for this crime.

There's also a letter from the AIDS Counsel, there's your certificates of achievement in here from the AIDS Counsel. There's also some of your evaluations and peer trainer evaluation, peer education activity reports, and other things you have done while you have been in here.

What do you think is your most significant achievement?

A [Petitioner]: The HIV/STD peer educator, that brought me out a lot, I like doing that. I teach guys here ART and classes everyday in the p.m. mod, how to battle their aggression, and I do HIV every week, I hold a class for the guys to learn about prevention.

Q: Okay, good. You are facilitating ART?

A: Yeah, I been doing that now for about three years, two years."

In view of the foregoing, the Court finds that whatever the shortcomings, if any, in the various ISRs with respect to petitioner's rehabilitation/programing record, there is simply no basis to conclude that the October 2013 Parole Board did not have before it sufficient information with respect to such record.

Finally, the Court finds that the October 2013 parole denial determination was sufficiently detailed to inform petitioner of the reason(s) underlying the denial and to facilitate judicial review thereof. *See Ek v. Travis*, 20 AD3d 667, *app dismissed* 5 NY3d 862.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: February 5, 2015 at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice