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### Decision in Art. 78 proceeding - Rivera, Carlos (2011-10-25)

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**Matter of Rivera v New York State Div. of Parole**

2011 NY Slip Op 32762(U)

October 25, 2011

Sup Ct, Albany County

Docket Number: 3596-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of  
CARLOS RIVERA #06-A-0418,

Petitioner,

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

**DECISION and ORDER**  
**INDEX NO. 3596-11**  
**R.I. NO. 01-11-ST2728**

-against-

NEW YORK STATE DIVISION OF PAROLE,,

Respondent.

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Supreme Court of Albany County All Purposes Term, September 30, 2009  
assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Carlos Rivera, #06-A-0418  
Pro se Petitioner  
Wallkill Correctional Facility  
P. O. Box G  
750 Prison Road  
Wallkill, New York 12589

Eric T. Schneiderman, Esq.  
Attorney General of the State of New York  
Attorney for the Respondent  
(Adam W. Silverman, Esq. AAG)  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

This CLR Article 78 proceeding is brought by an inmate challenging the denial of parole.  
Petitioner asserts in conclusionary fashion that respondent's determination is arbitrary and

capricious, procedurally defective and irrational. Respondent asserts a general denial and seeks dismissal of the petition for failure to state a cause of action pursuant to CLR 3211(a)(7).

Petitioner is serving a term of 3 ½ to 7 years after a conviction of the crime of Burglary in the Third Degree. Petitioner appeared before the Parole Board for his second parole release interview on September 14, 2010. Petitioner's sentencing minutes were available for the Board's review. Parole was denied and the Board ordered the petitioner held for 24 months. The Board determined:

Despite issuance of an Earned Eligibility Certificate, discretionary release is denied. Following a careful review of your record and interview, this panel concludes that, if released, there is a reasonable probability that you would not live and remain at liberty without violating the law. Your release is thus not presently compatible with the public safety and welfare. Your instant offense in Brooklyn in February 2005 involved you and a codefendant burglarizing a residence. Your criminal history indicates you were on parole at the time from a 1996 attempted criminal sale controlled substance third. Your institutional programming indicates progress and achievement which is noted. Your disciplinary record appears clean and is likewise noted. You have approximately seven felonies and 12 misdemeanors. This is your fourth state bid. You have violated past parole supervision.

On December 29, 2010, the petitioner filed an appeal with the Parole Appeals Unit. The Appeals Unit affirmed the Parole Board's determination on April 12, 2011 denying the petitioner discretionary parole release. Petitioner now brings this Article 78 proceeding.

The Parole Board's actions are judicial in nature and may not be reviewed if done in accordance with the law (see, Executive Law § 259-i(5); Valderroma v. Travis, 19 AD 3d 904). Executive Law § 259-i(2)c provides that discretionary release to parole supervision is not to be granted to an inmate merely as a reward for good behavior while in prison, but after considering

whether “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 depreciate the seriousness of his crime as to undermine respect for the law.” (Matter of King v New York State Division of Parole, 83 NY 2d 788).

Petitioner argues that respondent’s failure to discuss every statutory guideline factor demonstrates that they were not considered. It is well established that the Parole Board need not expressly discuss each factor. (Matter of King v New York State Division of Parole, 83 NY2d at 71). While the relevant statutory factors must be considered, it is well settled that the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board. (Wood v. Dennison, 25 AD 3d 1056). Petitioner does not meet his burden of overcoming the presumption that the Board fulfilled its duty and considered all of the factors (Matter of Rivera v. New York Div. of Parole, 23 AD 3d 863) simply by showing that the Board failed to discuss each or to include it in the decision. (Matter of Hawkins v Travis, 259 AD 2d 813). The Parole Board’s determination will not be disturbed unless it is so irrational as to border on impropriety (Silman v. Travis, 95 NY 2d 470).

It is reasonable for the parole board to consider the criminal history and other background of the parole candidate when deciding on early release. (Matter of Tatta v. Dennison, 26 AD 3d 663). The seriousness of the offense is still a valid factor for consideration following a twenty-four month hold, and the board properly inquired into that. (see, Executive Law § 259-i(1)(a) and (2)c; Matter of Rios v. New York State Div. of Parole, 24 AD 3d 1147). If the Board afforded greater weight to petitioner’s criminal behavior, that does not render the denial of parole irrational or improper. (Matter of Dudley v Travis, 227 AD 2d 863). Executive Law § 259-i(2)c



does not grant parole release merely as a reward for appellant's good conduct or achievements while incarcerated. (Wellman v. Dennison, 23 AD 3d 974; Larrier v New York State Board of Parole Appeals Unit, 283 AD 2d 700). Receipt of an Earned Eligibility Certificate does not entitle the petitioner to discretionary parole release. (Corley v. New York State Div. of Parole, 33 AD 3d 1142; Pearl v. New York Div. of Parole, 25 AD 3d 1058). In addition, the Parole Board's decision to hold petitioner for the maximum period of 24 months is within the Board's discretion and was supported by the record. (Matter of Reed v. Division of Parole, 41 AD 3d 1016 ).

Petitioner's claim that he was denied due process has been examined and found to be without merit. Executive Law § 259-i, does not create an entitlement to release on parole and therefore does not create interests entitled to due process. (Paunetto v. Hammock, 516 F. Supp 1367 [US Dist. Ct., SD NY, 1981]). There is no due process right to parole. (Russo v. New York State Board of Parole, 50 NY 2d 69). Also, there is no due process right to an inmate obtaining a statement as to what he should do to improve his chances for parole in the future. (Boothe v. Hammock 605 F. 3d 661 [2<sup>nd</sup> Cir 1979]). Appellant's claim that the denial of parole release amounted to resentencing is without merit. (Crews v. New York State Executive Department of Parole Appeals Unit, 281 AD 2d 672).

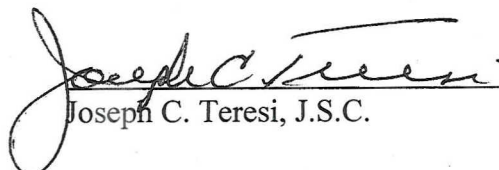
Finally, petitioner offers no proof, other than a conclusionary allegation that the Board's decision was predisposed to denying his release and therefore, his argument with respect to these issues are without merit. (Matter of Connelly v. New York State Division of Parole, 286 AD 2d 792, appeal dismissed 97 NY 2d 677). The record discloses the Board rendered its determination after considering the full record, including the hearing testimony, the petitioner's institutional background, his criminal history and release plans. (Salahuddin v. Dennison, 34 AD

3d 1082; Matter of Colon v. Travis, 305 AD 2d 407). Since respondent acted in accordance with the statutory requirements, and the petitioner has failed to meet his burden of showing irrationality bordering on impropriety, judicial interference is unwarranted. (Matter of Russo v. NYS Board of Parole, 50 NY 2d at 77).

This Decision and Order is returned to the attorney for the respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
October 25, 2011

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause dated June 9, 2011;
2. Verified Petition dated May 2, 2011 with Exhibit A;
3. Verified Answer dated September 22, 2011;
4. Affirmation of Adam W. Silverman, Esq. dated September 22, 2011 with Exhibits A-I.