September 2021

Decision in Art. 78 proceeding - Stasinski, Alan (2014-12-30)

Matter of Stasinski v Stanford
2014 NY Slip Op 33528(U)
December 30, 2014
Supreme Court, Franklin County
Docket Number: 2014-170
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
ALAN STASINSKI, #82-A-0173,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0090.16
INDEX # 2014-170
ORI #NY016015J

-against-

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

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Alan Stasinski, by his attorney, Cheryl L. Kates-Benman, Esq., verified on March 3, 2014 and filed in the Franklin County Clerk's office on March 6, 2014. Petitioner, who is an inmate at the Livingston Correctional Facility, is challenging the February 2013 decision denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on March 11, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 16, 2014 and supported by the Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, dated May 16, 2014, as well as by the Affirmation of Terrence X. Tracy, Esq., Counsel to the New York State Board of Parole, sworn to on May 5, 2014. The Court has also received and reviewed petitioner's Reply thereto, dated May 20, 2014 and filed in the Franklin County Clerk's office on May 22, 2014.

On January 8, 1982 petitioner was sentenced in Supreme Court, Kings County, to two concurrent indeterminate sentences of 15 years to life each upon his convictions (after pleas) of two counts of the crime of Murder 2°. After having been denied discretionary parole release on nine prior occasions, petitioner made his tenth appearance before a Parole Board on February 6, 2013. Following that appearance a decision was rendered again denying him discretionary parole release and directing that he be held for an additional 24 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 THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND 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. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: I.O.'S IS/ARE: MURDER 2ND (2 CTS) IN WHICH YOU SHOT YOUR FATHER MULTIPLE TIMES IN THE HEAD AND YOUR MOTHER IN THE FACE AND CHEST CAUSING BOTH OF THEIR DEATHS, YOU SUBSEQUENTLY FLED THE STATE AND THEN TURNED YOURSELF IN.
>
> NOTE IS MADE OF YOUR: SENTENCING MINUTES, COMPAS RISK ASSESSMENT, REHABILITATIVE EFFORTS, RISKS, NEEDS, PAROLE PLAN, LETTERS OF SUPPORT, COMMUNITY OPPOSITION TO YOUR RELEASE, CLEAN DISCIPLINARY RECORD, REMORSE AND ALL OTHER REQUIRED FACTORS.
>
> DESPITE NUMEROUS APPEARANCES BEFORE THE BOARD YOUR VERSION OF EVENTS CONTINUES TO EVOLVE IN ATTEMPTS TO MITIGATE YOUR GUILT. YOUR STORIES BEGAN WITH FICTIOUS ROBBERY TO FIRING IN THE AIR AND ACCIDENTALLY SHOOTING THEM, TO YOUR FATHER REACHING FOR A SHOTGUN. BUT ON PAGE 6 OF YOUR PLEA MINUTES YOU STATE 'I WAS INTENDING TO KILL THEM WHEN I PULLED THE TRIGGER'. THE PROBATION REPORT ALSO REFERS TO 'VOLUMINOUS' FAMILY COURT

> RECORDS, '6 OR MORE OOP [Orders of Protection]' AND NUMEROUS UNCHARGED ACCOUNTS OF ABUSE, INTIMIDATION AND [sic], VIOLENCE.
>
> YOU LACK INSIGHT AS TO THE DEPTH AND NATURE OF YOUR VIOLENCE. PAROLE IS DENIED."

Documents perfecting petitioner's administrative appeal from the February 2013 parole denial determination were received by the DOCCS Parole Appeals Unit on February 20, 2013 and May 30, 2013. On or about November 20, 2013 the Parole Board, upon recommendation of the DOCCS Parole Appeals Unit, affirmed the February 2013 parole denial determination. 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 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 and transcript of petitioner's February 6, 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, lack of prior criminal record, clean disciplinary record and release plans/community support as well as the circumstances of the crimes underlying petitioner's incarceration[1].

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider 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 heinous nature of the crimes underlying petitioner's incarceration as well as a perceived lack of insight into the depth/nature of his violence. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Santos v.*

[1] The petitioner also argues that the Parole Board failed to review a private risk assessment prepared by Dr. Joel Schorr. The petitioner was apparently seen by Dr. Schorr in January of 2008 and, according to counsel for the petitioner, Dr. Schorr's risk assessment was submitted in petitioner's 2011 parole plan and again referenced in the 2013 parole plan. The Court nevertheless finds that petitioner's argument on this point has not been preserved for judicial review in this proceeding since it was not advanced in the context of petitioner's administrative appeal from the February 2013 parole denial determination. *See Tafari v. Evans*, 102 AD3d 1053 and *Nicoletta v. New York State Division of Parole*, 74 AD3d 1609, *app dis* 15 NY3d 867. Although petitioner may have raised an issue with respect to the private risk assessment in connection with a prior parole denial determination, the Court finds nothing in any of the current administrative appeal documents to suggest that it was specifically raised in connection with the 2013 parole denial determination that is the subject of this proceeding.

Evans, 81 AD3d 1059, *Veras v. New York State Division of Parole,* 56 AD3d 878, *Garofolo v. Dennison,* 53 AD3d 734 and *Serrano v. Dennison,* 46 AD3d 1002.

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 . . ."[2] 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 the 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* 24 NY3d 901 and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903, *app dis* __ NY3d __, 2014 NY Slip Op 92790.

During the course of the February 6, 2013 Parole Board appearance one of the presiding commissioners noted that in the COMPAS ReEntry Risk Assessment Instrument prepared in conjunction with the consideration of petitioner for discretionary parole release he was ranked " . . . as a low across the board in terms of risk of violence, rearrest,

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[2] 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 . . ."

and absconding." The Court finds, 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). *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.

Although petitioner correctly asserts that a Transitional Accountability Plan (TAP) was not prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the February 2013 parole denial determination. As part of the same legislative enactment wherein Executive Law §§259-c(4) and 259-i(2)(c)(A) were amended (L 2011, ch 62, Part C, subpart A), a new Correction Law §71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence if imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

While Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAP's with respect to inmates - such as petitioner - already in DOCCS custody prior to the effective date of the statute. *See Rivera v. New York State Division of Parole*, 119 AD3d 1107.

Referencing Parole Commissioner Ferguson's "Worksheet," a copy of which was annexed to the Petition as part of Exhibit D thereof, it is argued in paragraphs 31 and 32 of the petition that " . . . respondents issued a pre-determined decision which was partially pre-typed before the hearing (upon information and belief) . . . [T]he form used as a Commissioner's worksheet appears to have portions pre-typed . . ."

The Court notes that the form in question, under the heading "CONDITIONS OF RELEASE/REASONS FOR DENIAL," does include pre-printed language (subject to being crossed out) that is common to many, if not most, parole denial determinations, along with

blank spaces presumably to be utilized for the recitation of facts and circumstances unique to the discretionary parole determination at hand. Notwithstanding the foregoing, the form in question, again under the heading "CONDITIONS OF RELEASE/REASONS FOR DENIAL," also includes pre-printed conditions of parole release. There is also a blank space on the worksheet form for an open parole release date. Thus, the worksheet form is readily adaptable for both determinations denying parole release and determinations granting parole release. Given such circumstances - and in view of the presumption of honesty and integrity that attaches to judges and administrative fact finders (*see People ex rel Johnson v. New York State Board of Parole*, 180 AD2d 914) - the Court finds no basis to overturn the February 2013 parole denial determination simply because one of the presiding parole commissioners had in his possession at the time of petitioner's February 6, 2013 appearance the pre-printed worksheet form adaptable to either the denial of parole or granting of parole. In this regard the Court finds nothing in the record to suggest that the pre-printed worksheet form had already been adapted by the parole commissioner's hand-written entries to be used only as a parole denial determination.

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: December 30, 2014 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice