September 2021

Decision in Art. 78 proceeding - West, Michael G. (2013-09-24)

[*1]

Matter of West v New York State Bd. of Parole
2013 NY Slip Op 51688(U) [41 Misc 3d 1214(A)]
Decided on September 24, 2013
Supreme Court, Albany County
Mott, J.
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Decided on September 24, 2013

Supreme Court, Albany County

In the Matter of the Application of Michael G. West, Petitioner,

against

New York State Board of Parole, Respondent.

3069-13

Petitioner:

Michael G. West

Self Represented Petitioner

Sing Sing Correctional Facility

354 Hunter Street

Ossining, NY 10562-5442

Respondent:

Eric T. Schneiderman, Esq.

Attorney General of the State of New York

The Capitol

Albany, NY 12224-0341

Brian J. O'Donnell, Esq., Assistant Attorney General,

of Counsel

Richard Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondent's June 11, 2012 [*2]decision denying him release on parole.

Petitioner asserts that the Parole Board impermissibly focused exclusively upon his criminal convictions and criminal history, ignored his many accomplishments, his decades of rehabilitative efforts, poor health, rubber stamped its six prior decisions which denied parole and thereby re-sentenced him, failed to mention his COMPAS evaluation or use written risks and needs procedures mandated by Executive Law §259-c(4), failed to consider his release plans, its decision was irrational bordering on impropriety, denial of parole was a foregone conclusion, the decision violated the Constitutional separation of powers, and he was denied due process because the Board's decision was insufficiently detailed to permit intelligent judicial review. Respondent denies these claims and asserts that it acted in full compliance with all legal requirements.

Petitioner, now 66 years old, serving a term of 25 years to life following his convictions in Erie County on December 13, 1976 [FN1], appeared for his seventh parole interview on June 11, 2012. At the time, he already had served more than 38 years, during which he had incurred a mere five disciplinary infractions and none within the past three years. While imprisoned he completed alcohol and substance abuse treatment, attended Narcotics Anonymous for 27 years, completed Aggression Replacement Training and Transitional programming in which he became a facilitator and clerk in the Targeted Assessment Reentry Program. Further, he completed many programs for which he achieved certifications, he worked in prison industries and as a clerk/typist, an administrative clerk in the law library, a tutor, a programming aide, and a teachers' assistant in a pre-GED program. In addition, in recent years his physical condition has deteriorated significantly: he suffers from rheumatoid arthritis and pulmonary edema and in 2010, surgery was required to remove a portion of his lung. Upon his release Petitioner has secured residence and transitional serivces through a halfway house operated by CEPHAS in Buffalo. His COMPAS evaluation places him in the lowest possible risk categories for felony violence, arrest and absconding. Notwithstanding the above exemplary record, yet again inexplicably he was denied parole. The panel stated:

> Denied, hold 24 months. Next appearance 6/2014.
>
> Following a careful review of your records and of the interview, it is the conclusion of this panel that if you were released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and that your release would be incompatible with the public safety and welfare of the community. This decision was based on the following: You continue to serve time for your conviction of four counts of murder and two counts or robbery. You and your co-defendants caused the death of two individuals by shooting them during a drug/gun deal. The crime surrounded a heroin for guns exchange. Your criminal history has been [*3]considered and includes involvement in two other states. The panel has considered your institutional behavior, along with any programs and/or vocational accomplishments. Note is also made of the risk assessment and all matters required by law. All things considered, you remain a threat to the community. Parole release is again denied. All Commissioners concur.

The Parole Board's Discretion

It is well settled that release on parole is a discretionary function of the Parole Board and that its determination will not be disturbed by the Court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 NY2d 470 (2000); *Matter of King v. NYS Division of Parole*, 190 AD2d 423 (1st Dept. 1993) aff'd 83 NY2d 788 (1994). In reviewing the Board's decision, the Court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute. *Matter of Thwaites v. New York State Board of Parole*, 34 Misc 3d 694 (2011).

The Parole Board is required to consider a number of factors in determining whether an inmate should be released on parole. Executive Law §259-i, *Matter of Malone v. Evans*, 83 AD3d 719 (2d Dept. 2011) and cases cited. While the Board need not expressly discuss each of these factors in its determination (see, *Matter of King v. New York State Division of Parole*, 83 NY2d 788, 790 (1994)) or afford these factors equal weight (see, *Matter of Wan Zhang v. Travis*, 10 AD3d 828 (3d Dept. 2004)), it is the obligation of the Parole Board to give fair consideration to each of the statutory factors, and where, as here the record convincingly demonstrates that the Board in fact failed to consider the proper factors, the Court must intervene. *Matter of King v. New York Division of Parole*, 190 AD2d at 431.

The Inadequacy Of The Board's Decision Thwarts Judicial Review

The Parole Board is required to inform an inmate in writing of the factors and reasons for a denial of parole, and "such reasons shall be given in detail and not in conclusory terms." Executive Law §259-i(2)(a). See, *Matter of Malone v. Evans*, 83 AD3d 719 (2d Dept.

2011), *Matter of Mitchell v. New York State Division of Parole*, 58 AD3d 742 (2d Dept. 2009). As the Court wrote in *Cappiello v. New York State Board of Parole*, 6 Misc 3d 1010(a), 2004 WL 3112629 (NY County, 2004), a detailed written explanation is necessary to enable intelligent judicial review of the Board's decision. See, *Canales v. Hammock*, 105 Misc 2d 71, 74 (Sup. Ct. Richmond County 1980), *United States ex rel Johnson v. Chairman of New York State Bd. Of Parole*, 363 F.Supp 416, 419 (S.D.NY 1973), aff'd 500 F.2d 925 (2d Cir. 1974). See, also, *Mayfield v. Evans*, 93 AD3d 98, 110 (1st Dept. 2012)("the absence of a detailed decision inappropriately foreclosed the possibility of intelligent review..." in parole revocation), *Lu Po-Yen v. Dennison*, 28 AD3d 770 (2d Dept. 2006) and cases cited. Similarly, as noted in *Matter of Flynn v. Travis*, Index No. 19169/98 (Westchester County, 1999), the Board "should be well able to articulate the reasons" for its decision "if it were come to reasonably, in a non-arbitrary, non-capricious manner." Without such an exposition, "the Court's authority to review in the proper circumstances is [*4]thwarted entirely." *Id.*

A. The Board's Perfunctory Boilerplate Decision

In this, Petitioner's seventh appearance before the Parole Board, the transcript of proceedings comprised a mere eight and one half pages. The interview consists of 185 lines of questions and answers, only 40 of which concerned factors other than his criminal history and subject crimes, i.e. 1.8 pages of the 8.5 page transcript. See, Tr. 7, lines 4-25; Tr. 8, lines 1-8; Tr. 9, lines 10-19. The Board's clear focus was on Petitioner's criminal record prior to his 1976 conviction and the subject conviction. The Board's intent to focus exclusively on these two factors is corroborated by its boilerplate decision, which recites statutory language and the following terse, conclusory sentences: "The panel has considered your institutional behavior, along with any programs and/or vocational accomplishments. Note is also made of the risk assessment and all matter required by law."

Petitioner argues that as in *Matter of Canales*, 105 Misc 2d at 75, the Board's decision is utterly inadequate to permit even a limited review of its determination. "It should be quite clear that the paucity of detailed reasons in its decision herein does not comply with the law or provide a basis for intelligent review..." This Court agrees. Indeed, the inadequacy of both the Interview and the Decision convincingly demonstrate that the Board failed to provide a basis upon which the Court could review the Board's decision.

B. The Undisclosed Victim Impact Statements

The Board received and presumably reviewed a victim impact statement from a relative of one of the victims [FN2]. However, Respondent's Answer failed to disclose that such victim impact statement had been submitted, let alone that the same individual had submitted statements in each of Petitioner's six prior appearances [FN3]. This victim impact statement was not referenced during Petitioner's hearing, nor did the Board's decision refer to it, although the Board is required to consider it. Executive Law §259-i(2)(c)(A)(v). See, 9 N.Y.C.R.R. §8002.4 (7). The mandate that a victim impact statement "shall be maintained in confidence" (9 N.Y.C.R.R. §8002.4(e)) certainly should not trump the statutory requirement that the Board's decision reveal the factors and reasons it considered in reaching its decision, particularly when such consideration is mandated by statute, Executive Law §259-i(2)(a). [*5]

The degree to which the victim impact statement figured in the Board's decision is particularly critical. The Board's disingenuous and purely ceremonial description of the factors and reasons for its decision transforms the parole process into a charade in which meaningful judicial review repeatedly is subverted, where, as here, material relied upon by the Board remains undisclosed in the hearing and in its determination [FN4].

Accordingly, the Board's decision must be vacated, a new hearing conducted, and a decision that complies with the statutory mandate must be issued in order to ensure appropriate judicial review.

Focusing Exclusively On Petitioner's Crimes And Criminal Record

The Court finds that the Board's decision focused exclusively on Petitioner's crime and prior criminal record. See, pages 3, 4, 5, *ante.* While the seriousness of the crime remains acutely relevant in determining whether Petitioner should be released, the record in this case demonstrates conclusively that the Board failed to take into account and fairly consider any of the other relevant statutory factors. See, e.g., *Matter of Silmon v. Travis*, 95 N.Y2d at 476-7. Indeed, the Board's perfunctory mention of matters it considered is inadequate in the circumstances of this case to demonstrate that it weighed or fairly considered the required statutory factors. See, e.g., *Matter of Rios v. New York State Division of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561 (Kings County, 2007).

Specifically, the record demonstrates that the Board failed to consider and weigh relevant factors, which clearly supported Petitioner's release on parole. These include, but are not limited to: Petitioner's lack of disciplinary infractions, his completion of programs while incarcerated, his remorse and acceptance of responsibility for his crime, and a COMPAS evaluation revealing a low overall risk for felony violence, to re-offend or abscond. See, also, pages 2-3, *ante*. Despite these factors, the Board concluded, "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 and safety of the community." Such an arbitrary decision can be reached solely by ignoring statutorily required factors. See, e.g., *Matter of Peckham v. Calogero*, 12 NY3d 424, 431 (2009)("An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.") See, e.g., *Matter of Wallman v. Travis*, 18 AD3d 304 (1st Dept. 2005), *Matter of Coaxum v. New York State Board of Parole*, 14 Misc 3d 661 (Bronx County, 2006), *Matter of Weinstein v. Dennison*, 7 Misc 3d 1009(A), 2005 WL 856006 (New York County, 2005).In light of the foregoing, the Court does not reach Petitioner's other arguments.

The matter is remanded to the Board which, on or before October 7, 2013, shall hold a new parole hearing before a new panel consistent with this Decision and Order and issue a decision within two days thereof, a copy of which forthwith shall be provided to the Court.

This constitutes the Decision and Order of this Court. The Court is forwarding the [*6]original Decision and Order directly to Respondent, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated:Claverack, New York

September _____, 2013

ENTER

_____

RICHARD MOTT, J.S.C.

Papers Considered:

1.Order to Show Cause, dated June 10, 2013, Affidavit in Support of Order to Show Cause, dated May 22, 2013, Verified Petition, dated May 22, 2013, with transcript and Exhibits A-B;

2.Answer, dated August 8, 2013, Affirmation of Keith A. Muse, Esq., dated August 8, 2013 with Exhibits A-Q;

3.Respondent's additional in camera submission of September 13, 2013.

Footnotes

Footnote 1: Petitioner was convicted after trial of Murder in the Second Degree (4 counts) and Robbery in the First Degree (2 counts).

Footnote 2: Surprisingly, the Board determined that a nephew of a victim who was five years old at the time of Petitioner's crime was an "appropriate victim's representative." 9 N.Y.C.R.R. §8002.4(5).

Footnote 3: As in *Matter of Zarro v. New York State Department of Corrections*, Index No. 6073-13, the Attorney General **again** has failed to append crucially relevant documents to Respondent's Answer or submit them for *in camera* review. Exhibit "D" to the Answer, the Confidential Portion of Inmate Status Report, merely makes reference to a "confidential file for the Parole Board's review." Under the circumstances the Court was compelled to direct production of same. Failure to provide a court with all documents considered by the Parole Board bespeaks Respondent's view that the Board's actions simply should be rubber stamped.

Footnote 4: Here, the victim impact statement argued repeatedly over seven parole board appearances that Petitioner should never be

released from prison. Ths Court has no way of knowing how and to what extent the Board's determination was influenced by such an extreme recommendation.

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