November 2021

Decision in Art. 78 proceedings - Pulliam, Dwayne (2018-10-10)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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DWAYNE PULLIAM, #99-A-2489.

Petitioner,

-against-

TINA M. STANFORD, CHAIRWOMAN, NYS PAROLE BOARD

Respondents.

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Corrected
DECISION, ORDER AND JUDGMENT

Index No. 2018-51443

POSNER, J., ACTING SUPREME COURT JUSTICE

THE FOLLOWING PAPERS WERE READ AND CONSIDERED ON THIS APPLICATION by petitioner pursuant to Article 78 of the CPLR for an order reversing respondent's determination which denied petitioner parole release.

	PAPERS NUMBERED
NOTICE OF PETITION.....	2 pp.
VERIFIED PETITION.....	26 pp.
EXHIBITS.....	A-E
VERIFIED ANSWER AND RETURN.....	12 pp.
EXHIBITS (2,3,& 10 for in camera inspection).....	1-11
REPLY AFFIRMATION.....	3 pp.

UPON THE FOREGOING PAPERS IT IS ORDERED THAT THE PETITION IS DENIED AND THIS PROCEEDING IS DISMISSED.

Petitioner is an inmate currently incarcerated at Fishkill Correctional Facility and is serving an indeterminate sentence of 15 years to life pursuant to his conviction of murder in the second degree. The conviction stems from petitioner fatally stabbing his girlfriend 17 times during a disagreement. At the time of the incident the petitioner was on federal probation pursuant to his

conviction of possession of a firearm by a felon.

Petitioner appeared before the Parole Board (Board) on July 26, 2017 for his third parole interview. At the conclusion of the interview the Board denied petitioner parole release and ordered him held for an additional 24 months. His next parole appearance is September 2019.

Petitioner administratively appealed the Board's decision which was affirmed on January 25, 2018.

Petitioner now challenges the Board's determination on the grounds that: (1) the Board decision is not sufficiently detailed; (2) the determination was based solely on the instant offense, was arbitrary and capricious and so irrational as to constitute an abuse of discretion; and (3) the Board's decision violates his due process rights. Respondent opposes the petition.

It is well-settled that parole release decisions are discretionary and if made in accordance with the statutory requirements such determinations are not subject to judicial review (Executive Law § 259-i[5]; Executive Law § 59-i [2][c][A]; *Matter of Silman v. Travis,* 95 NY2d 470, 476 [2000]; *Matter of LeGeros v. NYS Bd. of Parole,* 139 AD3d 1068 [2d Dept 2016]). However, the Board's discretion is neither unfettered nor "unlimited" (*see Matter of Bruetsch v. NYS Dept. of Corr. and Community Supervision*, 43 Misc. 3d 1223(A), 2014 NY Slip Op 50755[U] [Sup Ct, Sullivan County 2014]).

Executive Law §259-i [2][c][A] requires a Parole Board to consider eight factors. The Board must also consider 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 deprecate the seriousness of his crime as to undermine respect for the law." (Executive Law §259-i[(2][c][A]; 9 NYCRR §8002.1).

In making its decision, the Board is also required to consider, among other factors:

> (i) the inmates' institutional record;
>
> (ii) the inmate's performance, if any, as a participant in a temporary release program;
>
> (iii) the inmate's release plans including community resources, employment, education and training and support services available to the inmate;
>
> (iv) any statements made by the victim's representative;
>
> (v) the seriousness of the offense, with consideration to the type and length of sentence and the recommendation of the sentencing court.

Additionally, as revised, 9 NYCRR § 8002.3 requires the Board to consider "the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision" (9 NYCRR § 8002.3[a][11]) [1] and "the most current case plan that may have been prepared by the Department of Corrections and Community Supervision pursuant to section 71-a of the Correction Law" (9 NYCRR § 8002.3[a][12])[2]. Recently amended, effective September 17, 2017, 9 NYCRR §8002.2 imposes a significant burden upon the Board to provide individualized reasons for any departure from an inmate's risk and assessment score (9 NYCRR § 3002.2; 9 NYCRR §8002.3(b)). The amended regulation states, in relevant part, that if parole is not granted, reasons "shall be given in detail, and shall, in factually individualized and non-conclusory terms address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case" (9 NYCRR §8002.3 [b]). Such amendments are not retroactive. (*see Applegate v. New York State Board of Parole*, 164 AD3d 996 [3d Dept 2018]).

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[1]The Correctional Offender Management Profiling for Alterative Sanction (COMPAS) is one such Risk and Needs Assessment Instrument.

[2]The Transition Accountability Plan (TAP) is such a case plan.

Further, pursuant to Executive Law §259-c[4] the Board is to utilize procedures 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 in determining which inmates may be released to parole supervision." The role of the Board is to determine whether, *at the time of the hearing*, petitioner should be released, based upon consideration of the statutory factors (*see Matter of King v. NYS Div of Parole*, 190 AD2d 423 [1st Dept 1993] *aff'd* 83 NY2d 788 [1994])(emphasis added)).

The weight to be accorded each of the requisite factors is within the Board's discretion and it need not give each factor equal weight in rendering its decision (*Matter of King, supra* at *791; Matter of Coleman,* 157 AD3d 672 [2d Dept 2018]; *Matter of Goldberg v. NYS Bd. of Parole*, 103 AD3d 634 [2d Dept 2013]; *Matter of Huntley v. Evans,* 77 AD3d 945, 946 [2d Dept 2010]). The Board need not give the COMPAS Risk and Needs Assessment instrument or the TAP any greater weight or consideration than the other factors (*see Matter of Lewis v. Stanford*, 153 AD3d 1478 [3d Dept 2017]). It is permitted to weigh the serious nature of the crime more heavily than other, more favorable, factors (*see Matter of Davis v. Evans*, 105 AD3d 1305 [3d Dept 2013]; *Matter of Davidson v. Evans*, 104 AD3d 1046, 1046 [3d Dept 2013]). The Board is not required to articulate the weight accorded each factor it relied upon in rendering its decision (*Matter of Goldberg v. NYS Bd. of Parole, supra* at 634; *Matter of Gelsomino v. NYS Bd. of Parole,* 82 AD3d 1097, 1098 [2d Dept 2011]) or prior to the most recent amendments, to discuss each of the factors in its written decision *(Matter of Marszalek v. Stanford*, 152 AD3d 773 [2d Dept. 2017]; *LeGeros v. NYS Board of Parole*, 139 AD3d 10698 [2d Dept 2016]).

Nonetheless, the Board must set forth an explanation for its determination in detail and not just in conclusory terms (Executive Law § 259-i[2][a]; *Matter of Ramirez v. Evans,* 118 AD3d 707

[2d Dept 2014]; *Perfeto v. Evans,* 112 AD3d 640 [2d Dept 2013]). Absent a convincing demonstration to the contrary, it is presumed that the Board acted properly and in accordance with statutory requirements *(see Matter of Jackson v Evans*, 118 AD3d 701 [2d Dept 2014]). Before Court intervention is warranted in parole determinations, the inmate must establish that the Board's decision was irrational "bordering on impropriety" *(Matter of Partee v. Evans*, 117 AD3d 1258, 1259 [3d Dept 2014] *lv denied* 24 NY3d 901 [2014] *quoting Matter of Russo v. NYS Bd. of Parole*, 50 NY2d 69, 76 [1980]; *Matter of Martinez v. NYS Div. of Parole*, 73 AD3d 1067,1067 [2d Dept 2010] and the decision was thus arbitrary and capricious.

"Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstances, it acts irrationally" (*Matter of Gelsomino v. NYS Bd. of Parole*, *supra* at 1098 *citing Matter of Huntley v. Evans*, 77 AD3d 945, 947 [2d Dept 2010]; *King v. NYS Div. of Parole*, 190 AD2d 423 [1st Dept 1993], *aff'd* 83 NY2d 788 [1994]). Whether the Board followed the proper guidelines should be assessed based upon the written determination in conjunction with the parole hearing transcript (*see Matter of Jackson v. Evans*, 118 AD3d 701, 702 [2d Dept 2014] *citing Matter of Siao-Pao v. Dennison*, 11 NY3d 777,778 [2008]).

Based upon a review of the record, including the materials submitted for in camera review, the Court finds that under the particular circumstances of this case the Parole Board did not act irrationally or arbitrarily in denying the petitioner's request for discretionary release. The Board set forth with sufficient particularity the basis for its decision, including the required statutory factors.

The Board considered the seriousness of the crime committed; petitioner's prior multi state and federal criminal history and record on community supervision which included drugs, weapons, theft and assault related offenses; the petitioner's institutional adjustment including his participation

in college, volunteer efforts, IPA training and vocational work; his most recent COMPAS Risk and Needs Assessment; his plans upon release and needs for successful reentry into the community; and his prior disciplinary record. The Board recognized the petitioner's "personal growth and productive use of time" however, "remains concerned about [petitioner's] minimization and limited insight about your actions brutally stabbing your victim which raises concerns about your rehabilitative progress." The Board noted that the decision was based upon a review of the case record as well as the interview.

During his interview the petitioner initially indicated that he and the victim argued over the victim's use of drugs and the petitioner's anger at her use in light of his prior drug history. He then indicated that he used cocaine the night before the incident because he was angry at the victim and they got into a fight. He claimed that the victim stabbed him in the hand and that he stabbed her in the chest 17 times because in his mind he thought she might kill him. He admitted that she had stumbled and fallen several times during the incident and that he did not stop. He walked away and was picked up by police shortly thereafter. During his interview petitioner stated that he could have avoided the incident by not ingesting drugs initially. However, he then stated "I didn't know she was going to pull the knife out and stab me. I didn't have insight to that. If I would have had insight to that, I think I could have talked her – I think I could have talked us out of the situation."

The petitioner here had an extensive criminal history prior to committing the instant offense, including multiple assaults, and was on federal probation at the time that the instant offense was committed. He conceded in his parole interview that he currently has a federal detainer on him as a result. In addition, petitioner admitted to an extensive substance abuse history and cited his use of drugs as a factor in the instant offense, which is a factor which the Board may consider(*see Bush*

v. Annucci, 148 AD3d 1392 [3d Dept 2017]. Petitioner's COMPAS risk and needs assessment was mixed, with the petitioner scoring low in most areas but a medium to high probability of future criminal involvement and re-entry into substance abuse.

To the extent that the petitioner argues that his due process rights have been violated as the Board's decision was arbitrary and capricious and an abuse of discretion the Court finds such argument unavailing.

Based upon the foregoing, it is hereby:

ORDERED, that the petition is DENIED.

The materials submitted by respondent for *in camera* inspection are being returned to counsel for the respondent; all other papers are being transmitted to the Dutchess County Clerk for filing.

SO ORDERED

DATED: Poughkeepsie, NY
October 10, 2018

ENTER:

Joan S Posner

HON. JOAN S. POSNER
ACTING SUPREME COURT JUSTICE

NOTICE OF APPEAL

PLEASE TAKE NOTICE that an appeal may be taken from an order of this Court to the Appellate Division Second Department. Section 5513 of the CPLR provides that the appeal must be taken within thirty days after the entry and service of any order from which the appeal is taken.

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