November 2021

Decision in Art. 78 proceeding - Bellerose, Jessica (2020-08-14)

STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

JESSICA BELLEROSE,

Petitioner,

DECISION & JUDGMENT

-against-

TINA M. STANFORD, CHAIR OF THE
NEW YORK STATE PAROLE BOARD,

Respondent.

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

Index No.: 902373-20

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Petitioner is serving a prison term of 2⅓ to 7 years on her convictions of vehicular manslaughter in the second degree and manslaughter in the second degree, to be followed by a three-year term of probation on her conviction of driving while intoxicated (*see* NYSCEF Doc Nos. 11, 13; *see also* NYSCEF Doc No. 1 ["Petition"] at p. 1). All of these convictions stemmed from an October 11, 2016 incident in which petitioner operated a motor vehicle on a public highway with a blood alcohol content of .14%, ultimately striking another vehicle and causing the death of its driver, a young woman (*see* NYSCEF Doc Nos. 5, 12-13, 19).

Petitioner appeared before the Board of Parole ("Board") for her initial interview on May 7, 2019 (*see* NYSCEF Doc Nos. 3, 14). The Board thereafter denied petitioner release to the community and ordered her held for reappearance in 24 months (*see* NYSCEF Doc Nos. 3, 15). That determination was upheld on administrative appeal (*see* NYSCEF Doc Nos. 7, 18).

In the Petition filed in this special proceeding brought pursuant to CPLR article 78,[1] petitioner argues that the Board's decision should be vacated because: (1) the Board failed to consider and/or properly weigh the requisite statutory factors; (2) the Board's decision lacks sufficient detail; (3) the Board ignored and never rebutted the presumption of release afforded by her earned eligibility certificate ("EEC"); and (4) the Board failed to comply with the 2011 amendments to the Executive Law, inasmuch as her mostly positive COMPAS was ignored, the one negative score is an error, and the pertinent statutes are forward looking. The Board opposes the Petition through an answer.

[1] Although the Petition is not verified, respondent does not argue that it should be treated as a nullity (*cf.* CPLR 3022).

The scope of judicial review of the Board's determinations is set forth in Executive Law § 259-i (5), which provides that "[a]ny action by the [B]oard . . . pursuant to [Executive Law article 12-B] shall be deemed a judicial function and shall not be reviewable if done in accordance with law." "The Court of Appeals has long interpreted that language – in both current and prior statutes – to mean that 'so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts'" (*Matter of Hamilton v New York State Div. of Parole*, 119 AD3d 1268, 1269 [3d Dept 2014], quoting *Matter of Hines v State Bd. of Parole*, 293 NY 254, 257 [1944]). Accordingly, "[a]bsent failure by the Board to comply with the mandates of Executive Law article 12-B, '[j]udicial intervention is warranted only when there is a showing of irrationality bordering on impropriety'" (*id.*, quoting *Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *see Matter of Allen v Stanford*, 161 AD3d 1503, 1504 [3d Dept 2018], *lv denied* 32 NY3d 903 [2018]).

"Executive Law § 259-i (2) (c) sets forth the factors that the Board must consider when making discretionary parole release determinations, including the inmate's institutional record, the seriousness of the offense, the recommendations of the sentencing court and the District Attorney, the presentence probation report and mitigating or aggravating factors to the crime, among others" (*Matter of Allen*, 161 AD3d at 1504). The Board, however, "is not required to give equal weight to each statutory factor" (*id.*; *see Matter of Tafari v Cuomo*, 170 AD3d 1351, 1352 [3d Dept 2019], *lv denied* 33 NY3d 907 [2019]).

In rendering the determination challenged herein, the Board had before it and considered: petitioner's criminal history; risk to society; her institutional adjustment, programming, disciplinary record and rehabilitative efforts; proposed release plans; the sentencing minutes;

petitioner's EEC; the COMPAS Risk and Needs Assessment; letters in support and in opposition to release; and facts concerning the underlying offense (*see* NYSCEF Doc Nos. 5-6, 14, 19-23).

The Board determined that, "if released at this time, [petitioner's] 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" (NYSCEF Doc Nos. 3, 15). The Board reasoned:

> Your serious instant offense involved your actions of drinking and driving recklessly, causing the death of the victim. You had a BAC of .14%. You failed to acknowledge the dangers of drinking and driving which puts society at risk. During the interview you expressed remorse for your actions. You further state that on the day of the instant offense, you were very emotional over the demise of your relationship. You proceeded to make a selfish decision, which is to drink and drive. Your criminal record reflects no prior unlawful conduct. The instant offense represents your only NYS term of incarceration.
>
> As to your institutional record, the panel notes your efforts toward rehabilitation and completion of most required programs. The panel commends you on your educational accomplishments. We have reviewed and considered your case plan and the results of your risk and needs assessment, and the mixed scores indicated therein with reentry substance abuse being high and low for all other categories. Your disciplinary record reflects positive adjustment to DOCCS rules and regulations.
>
> The panel notes your personal growth and efficient performance while incarcerated. However, the instant offense shows a total disregard for human life. You were engaged in conduct which caused the death of the victim, a young woman who was loved by her family. The mother of the victim expressed her pain during sentencing. She stated that "You took her only child and that it is the greatest sadness in the world." Note is made of your numerous letters of support. There is opposition to your release.
>
> Therefore, based on all required factors, discretionary release, at this time, is not warranted (*id.*).

Nothing in law, including the 2011 amendments to the Executive Law, prohibits the Board from exercising its discretion in the foregoing manner, and the Board is not required to articulate each statutory factor that it considered nor give each factor equal weight (*see Matter of*

King v New York State Div. of Parole, 83 NY2d 788, 791 [1994]; *Matter of Wade v Stanford*, 148 AD3d 1487, 1488 [3d Dept 2017]; *Matter of Neal v Stanford*, 131 AD3d 1320, 1321 [3d Dept 2015]). Indeed, the law prohibits the Board from granting parole "merely as a reward for good conduct" (Executive Law § 259-i [2] [c] [A]; *see Matter of Silmon*, 95 NY2d at 476; *Matter of Gutkaiss v New York State Div. of Parole*, 50 AD3d 1418, 1418 [3d Dept 2008]).

The Board must instead consider, based on the totality of the circumstances, whether "there is a reasonable probability that, if such inmate is released, [she] will live and remain at liberty without violating the law, and that [her] release is not incompatible with the welfare of society and will not so deprecate the seriousness of [her] crime as to undermine respect for law" (Executive Law § 259-i [2] [c] [A]). To this end, the Third Department "has repeatedly held" that the Board is "entitled to place a greater emphasis on the gravity of [the] crime," no matter how "exemplary" the inmate's efforts at rehabilitation (*Matter of Hamilton*, 119 AD3d at 1271-1272 [internal quotation marks, alterations and citations omitted]; *see Matter of Copeland v New York State Bd. of Parole*, 154 AD3d 1157, 1158 [3d Dept 2017]).

In addition to emphasizing the seriousness of petitioner's offense, the victim impact statements, and the other opposition to petitioner's release,[2] the Board also considered petitioner's "high[] probab[ility]" of substance abuse reentry, as indicated in her COMPAS (NYSCEF Doc No. 21). In this regard, petitioner maintains that the Board failed to properly utilize COMPAS and that there is an error in her substance abuse score.

[2] The Board properly may consider the District Attorney's recommendation to deny parole, which was submitted *in camera* (*see* NYSCEF Doc No. 16; *Matter of Applegate v New York State Bd. of Parole*, 164 AD3d 996, 997 [3d Dept 2018]).

Contrary to petitioner's contention, the mostly low COMPAS scores do not entitle her to parole. The COMPAS scores are but one factor for the Board to consider, and the Board is not required to give COMPAS scores greater weight than other factors (*see Matter of Gonzalvo v Stanford*, 153 AD3d 1021, 1022 [3d Dept 2017]). Further, the Board properly may determine that a high probability of substance/alcohol abuse reentry outweighs low COMPAS scores in other categories (*see Matter of Wade*, 148 AD3d at 1488; *Matter of Bush v Annucci*, 148 AD3d 1392, 1393 [3d Dept 2017]).

As for petitioner's argument that the high-risk score in the substance/alcohol reentry category was an error, she failed to raise this issue during her interview (*see Matter of Bond v Stanford*, 171 AD3d 1320, 1321-1322 [3d Dept 2019], *lv denied* 34 NY3d 902 [2019]). In any event, petitioner has shown no error in her substance abuse score, particularly given her admitted history of alcohol and drug use, including driving under the influence in the past (*see* NYSCEF Doc No. 14 at pp. 5-7, 12-15).[3]

Contrary to petitioner's further contention, her receipt of an EEC "does not preclude the Board from denying parole" (*Matter of Romer v Dennison*, 24 AD3d 866, 867 [3d Dept 2005], *lv denied* 6 NY3d 706 [2006]; *see Matter of Corley v New York State Div. of Parole*, 33 AD3d 1142, 1143 [3d Dept 2006]), and the Board properly considered her receipt of an EEC in rendering the challenged determination, as it was obliged to do (*see* NYSCEF Doc No. 15; Correction Law § 805; *Matter of Wade*, 148 AD3d at 1488; *Matter of Neal*, 131 AD3d at 1321).

Finally, the record demonstrates that the Board issued a decision that "was sufficiently detailed to inform petitioner of the reasons for the denial of parole" (*Matter of Whitehead v*

[3] The Board also noted petitioner's "fail[ure] to acknowledge the dangers of drinking and driving which puts society at risk" (NYSCEF Doc No. 15).

Russi, 201 AD2d 825, 825-826 [3d Dept 1994]; *see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778 [2008]; *Matter of Dolan v New York State Bd. of Parole*, 122 AD3d 1058, 1059 [3d Dept 2014], *lv denied* 24 NY3d 915 [2015]; *see also* 9 NYCRR 8002.3 [b]).

In sum, where, as here, the Board exercises its discretion in accordance with the law, the Court may not substitute its judgment for that of responsible executive-branch officials (*see Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]). As petitioner has failed to establish that the Board violated any positive statutory requirement or that its determination as a whole is irrational, arbitrary or was rendered in violation of law, the petition must be dismissed (*see Matter of Wade*, 148 AD3d at 1488; *Matter of Neal*, 131 AD3d at 1321).[4]

Accordingly,[5] it is

ADJUDGED that the petition is dismissed.

This constitutes the Decision & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for respondent shall promptly serve notice of entry on petitioner (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]). Further, the exhibits submitted by respondent for *in camera* inspection are being returned to respondent.

Dated: Albany, New York
August 14, 2020

08/14/2020

RICHARD M. PLATKIN
A.J.S.C.

[4] The Court is unpersuaded by petitioner's reliance on *Matter of Hawthorne v Stanford* (135 AD3d 1036 [3d Dept 2016]), which involved institutional removal of medication from a mentally-ill inmate, and *Matter of Hawkins v New York State Dept. of Corr. and Community Supervision* (140 AD3d 34 [3d Dept 2016]), which involved a juvenile homicide offender.

[5] Given the comprehensive written submissions supplied by the parties, the Court finds that oral argument would not assist in the disposition of this matter.

Papers Considered:

NYSCEF Doc Nos. 1-7, 10-24 (Doc Nos. 12, 16, 20 and 22 submitted *in camera*)