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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of
ROSALIE CUTTING
Petitioner,

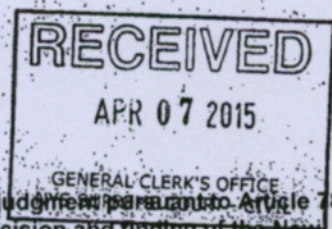
INDEX NO. 100553/14

-against-

MOTION SEQ. NO. 001

For a Judgment Pursuant to the Provisions of
Article 78 of the New York Civil Practice
Law and Rules,

NEW YORK STATE BOARD OF PAROLE,
Respondent.



The following papers were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the New York State Board of Parole.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this Article 78 proceeding, petitioner Rosalie Cutting (Ms. Cutting or petitioner) moves, pursuant to CPLR 7803, for an order annulling the October 3, 2013 determination of respondent New York State Board of Parole (Board or respondent), which denied her application for release on parole and ordering a new hearing.

On December 30, 2013, Ms. Cutting administratively appealed the Board's adverse determination to the Division of Parole. As of this date, the Division of Parole has not decided the administrative appeal. Pursuant to 9 NYCRR 8006.4(c), where the Division of Parole fails to decide the administrative appeal within four months, the individual "may deem this administrative remedy to have been exhausted, and thereupon seek judicial review of the underlying determination from which the appeal was taken. In that circumstance, the Division will not raise the doctrine of exhaustion of administrative remedy as a defense to such litigation."

BACKGROUND

Ms. Cutting is currently serving an indeterminate sentence of 25 years to life imprisonment at Taconic Correctional Facility in Bedford Hills, New York for murder in the second degree. She has been in prison for more than 25 years.

A. The Underlying Offense

On February 4, 1989, Ms. Cutting shot and killed Clive Waldrick (Mr. Waldrick), a friend of her husband. She had no prior criminal history. Prior to the crime, Ms. Cutting had secretly borrowed approximately \$11,000.00 from Mr. Waldrick in order to meet both ordinary and extraordinary household expenses. Ms. Cutting was the primary breadwinner in the home, as her husband did not contribute to household expenses, and her salary was not sufficient to meet the family's needs. In the weeks prior to the shooting, Mr. Waldrick began threatening to tell Ms. Cutting's husband about the loans if she did not pay the money back and, although she was able to repay a small part of the debt, she could not come close to repaying the full amount owed.

Ms. Cutting had a history of failed marriages that were marked by domestic violence and psychological abuse. Her husband, Hudson Cutting, the man she was married to when she committed the underlying offense, was similarly abusive. On the day of the underlying offense, Mr. Waldrick once again demanded money and threatened to tell Ms. Cutting's husband about the loans. Ms. Cutting, who was terrified that her husband would beat her if he found out, reacted by shooting Mr. Waldrick twice, causing his death. A jury convicted Ms. Cutting of murder in the second degree and she was sentenced to an indeterminate sentence of 25 years to life in prison.

B. Incarceration and Rehabilitation

While in prison, Ms. Cutting worked assiduously on her rehabilitation. It is undisputed that she committed no disciplinary infractions during her more than 25 years of incarceration

and that her COMPAS risk assessment, that is, the likelihood that she will reoffend or be a danger to society if released, is in the lowest percentile. She took advantage of the educational opportunities in prison and earned her GED, a bachelor's degree magna cum laude, a master's degree, and she is currently enrolled in a doctoral program. In addition, she designed and led programs for fellow prisoners to help them in their rehabilitation efforts, she designed and implemented a prenatal program for pregnant prisoners, she was selected to train dogs for community services such as guiding the blind, and she participated in programs to knit blankets and helmet liners for disabled veterans and active duty soldiers. She earned the respect of both prison staff and her fellow prisoners, and a former parole board chair. In addition, the judge who sentenced Ms. Cutting on the underlying offense informed the Board that he was not opposed to clemency for Ms. Cutting (Dignam Affirmation, exhibit B).

Moreover, while incarcerated, Ms. Cutting developed valuable occupational skills as a clerk in the prison Family Reunion Program, a customer service operator with the Department of Motor Vehicles and as an animal caretaker (*id.*), and she had several alternative plans for housing and employment upon her release. In addition, through the years, Ms. Cutting has consistently taken responsibility and expressed deep regret for her crime.

C. Parole Hearings

Ms. Cutting, who is currently 69 years old and legally blind in one eye, became eligible for early parole release in April 2013 by earning a limited credit time allowance (LCTA) because she had achieved several "significant programmatic accomplishments" and had committed no disciplinary infractions during her incarceration (see NY Correction Law § 803-b). She first appeared before the Board for release consideration on April 30, 2013. The Board denied release on May 2, 2013 and directed that Ms. Cutting be held until October 2013.

On October 1, 2013, Ms. Cutting appeared at her second parole hearing. The Board used the hearing primarily to question Ms. Cutting about the circumstances and details of her

offense. Indeed, a mere two pages of the 23-page transcript mentioned Ms. Cutting's efforts toward rehabilitation, lack of disciplinary history, her low COMPAS risk assessment score, and her release planning (Dignam Affirmation, exhibit A [hereafter Transcript] at 15). Throughout the hearing, Ms. Cutting took responsibility for her actions and attempted to explain that her crime was motivated by poor judgment based on fear of her abusive husband, not by monetary gain (Transcript at 19-21). However, in the October 3, 2013 decision denying parole, the Board focused almost entirely on the serious nature of Ms. Cutting's crime and that it was premeditated (Transcript at 27). While the Board did refer to Ms. Cutting's efforts at rehabilitation and release planning in a cursory manner, it failed to meaningfully discuss or analyze any factor other than the crime Ms. Cutting committed.

The decision states, in pertinent part:

"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 social [sic] and would so deprecate the serious nature of the crime as to undermine respect for the law.

The panel has considered your institutional adjustment, including discipline and program participation. Required statutory factors have been considered, including your risk to society, rehabilitation efforts and your needs for successful reentry into the community. Your release plans have also been considered, as well as your COMPAS Risk and Needs Assessment and sentencing minutes, which are in the file.

Your instant offense occurred in 1989 in Broome County in which you shot and killed the victim. It is reasonable to conclude that this was a premeditated killing which was planned over time concerning a debt owed to the victim and your concern that the victim would inform your husband.

In furtherance of the premeditated nature of the crime you engaged in a systematic [cover-up], as noted by the trial court, as well as destruction of evidence.

This panel remains concerned about your callous indifference to human life in committing a preplanned killing and engaged

in a course of conduct in doing so" (Transcript at 26-27).

DISCUSSION

In support of the petition, petitioner argues that the Board's decision was arbitrary and capricious and violated lawful procedure because it gave impermissible weight to the seriousness of the crime and it failed to meaningfully consider the other required statutory factors. In addition, Ms. Cutting contends that the Board violated lawful procedure because it failed to explain its denial in detailed or nonconclusory terms.

In opposition to the relief demanded in the petition, the Board argues that it has broad discretion in determining whether to grant parole; that it properly relied on the nature of the underlying offense; and that the procedures it utilized were adequate.

Executive Law § 259-1 (2)(c)(A) states, in relevant part:

"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."

Executive Law § 259-1 (2)(c)(A) requires the Board to consider the following factors in making its release decision:

- (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
- (ii) performance, if any, as a participant in a temporary release program;
- (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."

"The Parole Board performs a very significant function in determining the length of time which an inmate will spend in prison and it is entitled to exercise substantial discretion within its sphere." (*Matter of King v New York State Div. of Parole*, 190 AD2d 423, 430 [1st Dept 1993], *affd* 83 NY2d 788 [1994]). However, that discretion must be exercised under the standards laid down in the Executive Law, as set forth above (*see id.*). "It is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it" (*Matter of King v New York State Div. of Parole*, 190 AD2d at 431). The Board has the discretion to determine how much weight to give each of the applicable factors (*id.*) and, although the discretion reposed in the Board is broad, its determination will be overturned where it evinces "irrationality bordering on impropriety" (*Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]; *Matter of Samuel v Alexander*, 69 AD3d 861, 862 [2d Dept 2010]).

While this standard of review sets a high threshold, courts have reversed parole board decisions where the decision is based solely on the seriousness of the crime. "A Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by the statute, but also effectively constitutes an unauthorized resentencing of the defendant" (*Matter of Wallman v Travis*, 18 AD3d 304, 307 [1st Dept 2005]). Where, as here, the defendant had previously led a law abiding life and maintained a good prison record, the *Wallman* court found that the Board's failure to properly consider the petitioner's testimony regarding his remorse and insight into his crime and the reliance solely of the seriousness of the crime to deny parole "was irrational bordering on impropriety" (*id.* at 308-310; *see also Matter of Almonor v New York State Bd. of Parole*, 16

Misc 3d 1126[A], 2007 NY Slip Op 51588[U], *4 [Sup Ct, NY County 2007]; *Matter of Weinstein v Dennison*, 7 Misc 3d 1009[A], 2005 NY Slip Op 50518[U],*9 [Sup Ct, NY County 2005]).

Moreover, to demonstrate that it has properly considered and weighed applicable statutory factors, the Board must do more than make a passing reference to those factors (see *Pulinario v New York State Dept. of Corr. & Community Supervision*, 42 Misc 3d 1232[A], 2014 NY Slip Op 50301[U], *4 [Sup Ct, NY County 2014] [Board gave great weight to the seriousness of the crime without any explanation of why the 17-year old crime outweighed the mountain of evidence that demonstrates petitioner would be able to live a quiet and crime-free life]; *Matter of West v New York State Bd. of Parole*, 41 Misc 3d 1214[A], 2013 NY Slip Op 51688[U], *5 [Sup Ct, NY County 2013]; *Matter of Weinstein v Dennison*, 7 Misc3d 1009[A] at *7 [denial that remarked on inmate's positive institutional record inappropriately focused on his crime of manslaughter]).

In *Matter of Morris v New York State Dept. of Corr. & Community Supervision* (40 Misc 3d 226, 233-234 [Sup Ct, NY County 2013]), the court stated,

"the Board's passing mention of petitioner's 'receipt of an Earned Eligibility Certificate, good behavior, program accomplishments, and document submissions' and its conclusory statement that 'required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration,' were woefully inadequate in the circumstances of this case to demonstrate that the Board weighed or fairly considered the required statutory factors" (internal quotation marks omitted).

Indeed, in the matter before the Court, the record reveals a failure on the part of the Board to consider and fairly weigh all of the information available to it that was relevant under Executive Law § 259-l. Ms. Cutting submitted 13 multi-page exhibits to the Board including her COMPAS risk assessment; letters of support from prison staff, a former parole board chair, the sentencing judge, her professors, clergy, prison volunteers, and family; documentation of her

academic and vocational achievements; and detailed release plans. This documentation demonstrates Ms. Cutting's rehabilitative milestones and strongly militates in favor of granting parole (see *Matter of King v New York State Div. of Parole*, 190 AD2d at 433). However, the written decision issued by the Board merely notes Ms. Cuttings COMPAS risk assessment and her other accomplishments – there is no discussion regarding her exemplary record. "Simply noting achievements is not tantamount to considering them in a fair and thoughtful manner" (*Matter of Sanchez v Dennison*, NYLJ July 10, 2007 at 23, col 3 [Sup Ct, Albany County 7/10/07]; see also *Matter of Coaxym v New York State Bd. of Parole*, 14 Misc 3d 661, 668 [Sup Ct, Bronx County 2006] [fleeting reference to positive achievements is insufficient because these factors are of great importance in evaluating readiness for release]).

Here, as in *Matter of King v New York State Div. Of Parole* (190 AD2d at 431-432), "the record clearly reveals that the denial of petitioner's application was a result of the Board's failure to weigh all of the relevant considerations and there is a strong indication that the denial of petitioner's application was a foregone conclusion."

Under the facts and circumstances of this case, the Board's decision was arbitrary and capricious and "bordering on irrational" in that the Board failed to articulate a rational basis, in non-conclusory terms, as to how and why it determined that Petitioner's release at this time is incompatible with the welfare of society. In reaching this determination this Court recognizes the serious nature of Ms. Cutting's crime but, it also recognizes that the Legislature has determined that "rehabilitation is possible and desirable" even for the most serious of crimes (see *Matter of Rios v New York State Div. of Parole*, 15 Misc 3d 1107[A], 2007 NY Slip Op 50529[U], *5 [Sup Ct, Kings County 2007]).

CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted; and it is further,

ORDERED and ADJUDGED that the determination of respondent New York State Board of Parole dated October 3, 2013, denying petitioner Rosalie Cutting's release to parole supervision is hereby annulled; and it is further,

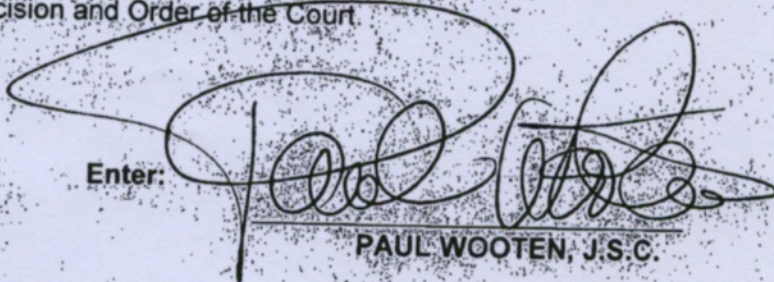
ORDERED and ADJUDGED that the matter is remanded to the Board of Parole for a re-hearing before a new panel within 45 days of service of this order and judgment with notice of entry; and it is further,

ORDERED that petitioner is directed to serve a copy of this Order with Notice of Entry upon respondent and the Clerk of the Court who is directed to enter judgment accordingly.

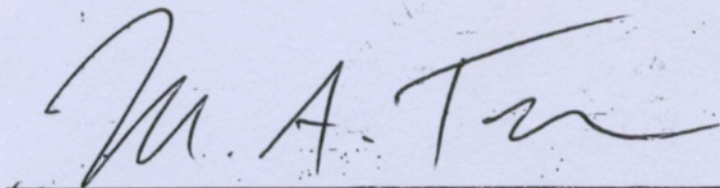
This constitutes the Decision and Order of the Court

Dated: 4/7/15

Enter:


PAUL WOOTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE


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BRETT DIGNAM, ESQ.
Counsel for Petitioner

MORNINGSIDE HEIGHTS LEGAL SERVICES
Columbia Law School
435 West 116th Street, Room 831
New York, NY 10027
Tel: 212-854-4291
Fax: 212-854-3554
bdigna@law.columbia.edu

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Judgment

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