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Decision in Art. 78 proceeding - Almonte, Juan (2019-04-22)

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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
In the Matter of the Application of

JUAN ALMONTE,
Petitioner,

DECISION AND ORDER
INDEX NO.: 10476/2018
Returnable: 2/11/19

-against-

TINA STANFORD, as the Chairwoman of the
State Board of Parole,

Respondent.

ORIGINAL

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

-----X
VAZQUEZ-DOLES, J.

The following papers numbered 1 to 6 were considered in connection with the application by petitioner for an order and judgment pursuant to Civil Practice Law & Rules Article 78:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause/Verified Petition/Exhibits A-D	1 - 3
Answer and Return/Exhibits 1-11	4 - 5
Verified Reply/Exhibit A	6

Petitioner, Juan Almonte (Petitioner) seeks an order and judgment pursuant to Civil Practice Law & Rules Article 78 granting the following relief: (A) annulment of the Parole Board's August 30, 2018 Decision denying him parole; and (B) a *de novo* parole hearing.

Background and Procedural History

Petitioner is serving an indeterminate sentence of 21 years to life, after conviction for the 1996 crime of second degree murder. He has been in prison for approximately twenty two years.

Petitioner first appeared before the Parole Board on August 30, 2017 at which time parole

was denied. The Board found:

After careful review of your record, your personal interview and due deliberation, it is the determination of this panel that if released at this time, there is a reasonable probability that you would not live at liberty without violating the law. **Your release is incompatible with the welfare and safety of the community, and will so deprecate the seriousness of this crime as to undermine respect for the law.** This Decision is based upon the following factors: You appeared before this panel with the serious instant offense of Murder 2nd in which you while acting in concert stabbed your grandmother to death and stabbed your four year old brother repeatedly. You showed a depraved indifference to human life that is disturbing to this panel. Consideration has been given to any program completion and satisfactory behavior, COMPAS, case plan, sentencing minutes, however, your release at this time is denied.

Petitioner appealed the Board's decision on various grounds, among which was the argument that the decision lacked sufficient detail and seemed to be based solely upon the serious nature of the crime committed. The Appeals Unit found that argument to have merit and recommended a *de novo* interview to be scheduled before different Board members with such interview to take place after receipt of the sentencing minutes from the sentencing court.

On June 26, 2018, petitioner had a *de novo* hearing of his first appearance before the Parole Board and, after the interview, denied parole. The Board decision found:

The Parole Board commends your personal growth and productive use of time, however, discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. **A review of your records and interview lead the panel to conclude that your release would be incompatible with the welfare of society and would so deprecate the seriousness of the crime as to undermine respect for the law.** Your instant offense is Murder 2nd which involved you brutally slicing your grandmother in the neck. After committing such a heinous act, you proceeded to approach your step brother and stab him. Your step brother was not threatening you but crying. However you felt the need to physically stab him in the neck. Your course of conduct and willingness to hurt your family clearly is a concern for the panel. Your file consists of significant achievements which is noted. Your positive programming is to your credit. Your COMPAS indicates a high risk of substance abuse. Also considered is your case plan and thorough sentencing minutes. The Panel notes your parole packet, program accomplishments and multiple letters of support. However more compelling is your violence regarding the instant offense. You stabbed both your young step brother and grandma. Releasing you at this time would clearly deprecate the seriousness of your offense and undermine respect for the law.

Petitioner filed an Administrative Appeal of the Board's June 26, 2018 decision on the grounds that it was conclusory, arbitrary and capricious, as well as irrational bordering on impropriety and that the Board violated statutory mandates. The Appeals Unit affirmed the Board's decision. Petitioner now makes application challenging the decision and subsequent appeal.

Petition and Answer

The Verified Petition originally filed together with his Order to Show Cause on or about October 19, 2018 asserts that petitioner's release was denied solely on the basis of the seriousness of his offense, and the conclusion reached by the Board as well as the Appeals Unit are set forth in impermissibly conclusory terms, unsupported by the facts. Petitioner asserts that the determination was arbitrary and capricious.

Essentially, petitioner argues that the June 26, 2018 Decision employs the same language and conclusions which were vacated by the Appeals Unit in the appeal of his August 2017 hearing. The determination lacks explanation or analysis of how the Board determined that petitioner's release would be incompatible with the welfare of society and would deprecate the seriousness of his crime so as to undermine respect for the law.

Petitioner further alleges that the Board's decision fails to meet the standards of Executive Law §259-i(2)(A) and 9 NYCRR §8002.3(d), which require that the reasons for the denial of parole be stated in detail. He asserts that the decision was wholly conclusory and fails to detail its reasoning as required by the Executive Law. Pointing to authority which requires the Board's conclusions to be set forth in sufficient detail to enable appropriate judicial review, petitioner further argues that the Board's conclusions are contrary to law, as they lack a sound basis in reason or with regard to the facts. Specifically, the Board relied on erroneous information in making its determination; the Board ignored the COMPAS Assessment, ignored the fact that the sentencing Court determined that a 21-year to life sentence was appropriate as

well as petitioner's completion of many required and optional programs.

Because the Board's determination lacks sufficient detail and is based solely upon the serious nature of the crime committed, petitioner asserts he is entitled to another *de novo* hearing.

In its Answer, respondent argues that petitioner's claims are without merit. The Board is entitled to exercise its independent judgment in weighing any statutory factor in making its determination. In so doing, the Board may place greater weight on an inmate's criminal conduct than upon his institutional adjustment and release plans; and a denial based on the determination that the inmate's achievements are outweighed by the severity of his crimes is neither arbitrary nor capricious, but is within the Board's discretion. Parole is not a reward for good conduct or achievements while incarcerated.

Respondent further asserts that the Board is not required to articulate the weight accorded to each factor. In the instant matter, respondent asserts that the record reveals that the Board considered all the required factors and supported its determination that the extremely serious nature of the offense was incompatible with the welfare of society. If the Board demonstrates that it has weighed the statutory factors involved in release determinations, its decision may not be disturbed.

Petitioner's Reply points out that the 2018 decision rests solely upon the serious nature of the crime committed and failed to appreciate that Petitioner's murder conviction was not for intentional murder but rather for second-degree felony murder. The Board failed to consider that Petitioner was acquitted of the charges of Murder 1st, Attempted Murder 2nd and Assault 1st. The remainder of his Reply reiterates his previously articulated positions that the determination was not based in fact or compliant with the law.

Discussion

Standards for Review:

It has become fundamental that release on parole is a discretionary function of the Parole

Board. Provided that the determination of the Board follows statutory standards for such decisions, it will not be disturbed by a court, absent a showing that the decision is “irrational bordering on impropriety” and, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 NY 2d 470 (2000); *Matter of King v. NYS Div. of Parole*, 190 AD2d 423 (1st Dep’t 1993), *aff’d*, 83 NY 2d 788 (1994); *Siao-Pao v. Dennison*, 51 AD3d 105 (1st Dep’t 2008).

Executive Law §259-i(c)(A) provides that discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but rather 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 the crime as to undermine respect for the law. *Matter of King*, 190 AD2d at 430

The Parole Board is required to consider a number of factors in determining whether an inmate should be released. Executive Law §259-i requires the court to consider factors including, but not limited to, the institutional record (including program goals and accomplishments, vocational education, academic achievements, etc); release plans, including community resources, employment, education and training and available support services; any deportation order issued; the seriousness of the offense, with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the attorney and the pre-sentence probation report, and the prior criminal record. *Matter of Malone v. Evans*, 83 AD3d 719 (2nd Dep’t 2011); *Siao-Pao v. Dennison*, 51 AD3d 105, at106[1st Dept. 2008]. For that reason, the Court rejects respondent’s arguments that petitioner did not preserve the issues regarding the Board’s failure to consider relevant factors in his administrative appeal.

The Parole Board’s decision need not specifically refer to each and every factor nor must it give each factor equal weight. *Matter of King*, 190 AD2d 423, 431[1st Dept. 2014]. The weight to be accorded to each statutory factor lies solely within the discretion of the Board. *Siao-*

Pao v. Dennison, 51 AD3d at 108. However, it is incumbent on the Board to actually consider each applicable statutory factor and, “where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene.” *Matter of King*, 190 AD2d at 431. Executive Law §259-c[4] requires the Board to incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release. The 2011 Amendments to the Executive Law mandated the Parole Board to adopt procedures to assist members in determining which inmates may be released to parole supervision. *Matter of Thwaites v. NYS Board of Parole*, 34 Misc. 3d 694 (2011).

Where the Board’s determination includes consideration of all relevant statutory factors, including the criminal history, the instant offense, the [lack of] disciplinary infractions since the last appearance, program and educational accomplishments and post-release plans, further judicial review is precluded. *Matter of Borcsok v. NYS Division of Parole*, 34 AD3d 961 (3rd Dep’t 2006).

Conversely, however, when the Board denies parole, it is required to inform the inmate in writing of the factors and reasons for the denial, and “[s]uch reasons shall be given in detail and not in conclusory terms.” Executive Law §259-i[2][a]; *Matter of Mitchell v. NYS Division of Parole*, 58 AD3d 742 (2nd Dep’t 2009). A detailed written explanation is necessary to enable intelligent judicial review of the Board’s decision. *Matter of West v. NYS Board of Parole*, 41 Misc. 3d 1214(A) (2013). The absence of such a detailed decision inappropriately forecloses the possibility of intelligent review. *Mayfield v. Evans*, 93 AD3d 98, 100 (1st Dep’t 2010). The decision to deny parole cannot be based solely on the nature of the underlying offense. *Winchell v. Evans*, 27 Misc. 3d 1232(A) (2010), citing *Wallman v. Travis*, 18 AD 3d 304, 307-08 (1st Dep’t 2005).

A Parole Board’s denial of parole which focused almost exclusively on the inmate’s

crime, while failing to take into account and fairly consider any of the other relevant statutory factors which categorically supported inmate's release, was arbitrary and capricious. Similarly, the Board's failure to explain, other than the facts of the crime, why the inmate's release was incompatible with public safety and welfare, could not be supported. *Matter of Morris v. NYS Dep't of Corrections and Community Supervision*, 40 Misc. 3d 226 (2013).

In the instant matter, the Court cannot find, as a matter of law, that the Board's hearing focused exclusively on petitioner's crime. In the hearing, the Board raised the issue of petitioner's achievements, his lack of disciplinary matters since 2014, and his family support. Nor can the Court find that the Board ignored the COMPAS assessment in the interview, noting, as it did, the high probability for substance abuse as well as the positive results it considered.

However, the decision of the Board is another matter. Although the serious nature of the crime remains "acutely relevant" in determining whether Petitioner should be released, the Board must still take into account and fairly consider the other relevant statutory factors. *Matter of West*, 41 Misc. 3d at 1214(A).

Petitioner's 2017 parole denial, vacated by the Appeals Unit, and his 2018 denial contain nearly identical justification, i.e., petitioner's release would be incompatible with the welfare of society and would deprecate the seriousness of the instant offenses and undermine respect for the law. Although there is language indicating that the Board considered more factors and commends Petitioner for his achievements in the 2018 determination such language, however, is no more explanatory or detailed than the "boilerplate" justification echoed in the previous parole denial decision.

It is particularly ironic that the "boilerplate" language follows a recitation of petitioner's positive factors, including his lack of other criminal history, his progress and achievements, his clean disciplinary record, etc., and then goes on to conclude that his discretionary release is *thus* incompatible with the welfare of society at large. (Emphasis added) Little could be more

contradictory and less informative.

In *Matter of Thwaites*, the Board's decision stated:

After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted, as is your improved disciplinary record. **This panel remains concerned, however, about** your history of unlawful conduct, the gracity (sic) of your instant offense and the disregard displayed for the norms of our society, **when considered with the required relevant factors leads to the conclusion that** your discretionary release is inappropriate at this time and **incompatible with the welfare of the community** and would so deprecate the seriousness of your crime as to undermine respect for the law. (Emphasis added) (34 Misc. 3d at 696)

The Court in *Thwaites* found that this language, although referencing "positive" factors, addressed, almost exclusively, the nature of petitioner's crime. (34 Misc. 3d at 700)

While the petitioner's accomplishments and release plans were noted, "the Board focused on the circumstances of the crime committed twenty-five years ago." *Id.*

Reasoning that employs past-centered rhetoric and not future-focused risk assessment analysis is inconsistent with the rational determination of the inquiry at hand, to wit, whether the inmate can live and remain at liberty without violating the law and whether his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law. *Id.*, citing Executive Law §259-i[2][c].

The Court in *Matter of Thwaites* found the Board's decision to be arbitrary and capricious, irrational and improper based on the Board's failure to articulate any rational, non-conclusory basis, other than its reliance on the seriousness of the crime, as to why the Board believed his release was incompatible with the welfare of society and would deprecate the seriousness of his crime so as to undermine respect for the law. *Id.* at 701

Similarly, in *Matter of Morris*, the Court found that a "passing mention" of petitioner's accomplishments and document submissions, and conclusory statements that

statutory factors were considered were “woefully inadequate” to demonstrate that the Board weighed or fairly considered the required statutory factors. 40 Misc. 3d at 234; *Matter of West*, 1214(A).

Although the Board need not specify each statutory factor in its decision, it must do “more than merely mouth” those criteria, particularly where, as here, factors recited in the interview, other than the crime itself, militated heavily in favor of release. *Weinstein v. Dennison*, 7 Misc. 3d 1009(A) (2005). The Parole Board’s determination must be sufficiently detailed to apprise petitioner of the reasons for the denial of his parole. *Matter of Stokes v. Stanford*, 2014 NY Slip Op. 50899(U) (June 9, 2014), citing, *Matter of Davis v. Travis*, 292 AD2d 742 (3rd Dep’t 2002).

In this matter, the Board’s decision appears to have accorded no weight to any factor apart from the seriousness of petitioner’s offense. See, *Winchell v. Evans*, 27 Misc. 3d 1232(A). For respondent to have simply restated the usual and predictable language contained in so many parole release decisions with no specificity or other explanation to justify parole denial is unacceptable. *Bruetsch v. NYS Department of Corrections and Community Supervision*, 43 Misc. 3d 1223(A) (5/11/2014). To simply defer to its conclusion leaves the reviewing court to guess at the basis for the Board’s denial. *Vaello v. Parole Board Div. of the State of New York*, 48 AD3d 1018, 109 (3rd Dep’t 2008); *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep’t 2013).

On the basis of the foregoing, the Court concludes that petitioner has adequately established his contention that the Parole Board’s determination was arbitrary and capricious, irrational and improper. Having so determined, the Court need not reach any of the other arguments advanced by petitioner. The confidential records submitted to the Court for *in camera* review are hereby sealed.

The June 26, 2018 decision of the Board of Parole is hereby vacated, and this

matter is remanded to the Board of Parole for further action. Within 30 days of the date of the service of a copy of this Order, with notice of entry, petitioner shall be entitled to a new parole hearing consistent with this decision and the mandates of Executive Law §§259-c and 259-i. The new hearing shall be held before a different panel of the Parole Board.

This decision shall constitute the order of the Court.

Dated: April 22, 2019
Goshen, New York

ENTER:


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