Decision in Art. 78 proceeding - Ramos, David (2022-03-23)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

DAVID RAMOS,

Petitioner,

DECISION AND ORDER

-against-

Index No. 2022-50440

TINA M. STANFORD, CHAIRWOMAN,
NYS BOARD OF PAROLE,

Respondent.

The following papers were read on this Article 78 petition:

NOTICE OF PETITION
PETITION
AFFIRMATION IN SUPPORT
EXHIBITS 1 - 14
MEMORANDUM OF LAW IN SUPPORT

ANSWER AND RETURN
EXHIBITS 1 - 13

REPLY MEMORANDUM OF LAW
EXHIBITS 1 - 2

Petitioner brings this CPLR Article 78 proceeding challenging a determination of the Board of Parole ("the Board") denying his request for parole release. Petitioner was convicted in 1992 of two counts of Attempted Murder 1st Degree, Criminal Possession of a Weapon 2nd Degree and Criminal Possession of a Weapon 3rd Degree. He was sentenced to a term of thirty years to life imprisonment. His conviction stems from Petitioner shooting a gun at a group of people from a rival drug gang and when the police arrived, firing three shots at the police. Petitioner was 21 years old

when he was arrested. At the time of his interview, Petitioner was 51 and had been incarcerated for approximately 30 years when he appeared for his parole release interview on February 9, 2021. Following the interview, the Board issued a written decision denying parole and ordered Petitioner held for 24 months. Petitioner's administrative appeal was denied and this proceeding followed.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole (*see Matter of Miller v New York State Div. of Parole*, 72 AD3d 690 [2d Dept 2010]). The parole 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" (9 NYCRR 8002.1). A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered (*see Matter of Huntley v Evans,* 77 AD3d 945 [2d Dept 2010]). It is further permitted to place a greater emphasis on the gravity of offense committed (*see Matter of Serrano v Alexander*, 70 AD3d 1099, 1100 [3d Dept 2010]). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense (*see Huntley v Evans*, 77 AD3d at 947; *King v New York State Div. of Parole*, 190 AD2d 423 [1st Dept 1993]). Moreover, while the board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the board must still consider the guidelines (*see* Executive Law §259–i[2][a]). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and "[s]uch reasons shall be given in detail and not in conclusory terms" (Executive Law §259-i[2][a]); *Malone v Evans*, 83 AD3d 719 [2d Dept 2011]). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent "a showing of irrationality bordering on impropriety" (*Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the Board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate's rehabilitation and likelihood of success upon release (*see Ramirez v Evans*, 118 AD3d 707 [2d Dept 2014]). In response, the Board of Parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool.

Here, the Board determination denying parole states, in relevant part,

> [D]espite the presentation of your satisfactory Case Plan, the Panel deems your institutional adjustment plagued with a poor disciplinary history. You have amassed multiple Tier III infractions for, but not limited to, direct order, unauthorized exchange, harassment, fighting, and multiple weapon infractions. The Panel does not

> depart from your low/unlikely COMPAS risk scores, however weighs heavily the high risk score for prison misconduct. Your inability to follow rules while confined leads the Panel to question your ability to follow the law.....
>
> The Record notes an order of deportation. You have asserted being born in Westchester, NY[;] however[,] [you] have yet to provide proof. This disparity warrants resolve during the period.
>
> Lastly, your release plan warrants attention. In the interview, you provided a proposed residence, other than that noted in the record.

Petitioner contends the Board's decision relied upon an inaccurate record and was contrary to law, arbitrary and capricious, and should be vacated.

First, Petitioner contends and Respondent does not dispute, that the COMPAS provided to the Board contained an error - it mistakenly listed a score of "High" for Prison Misconduct. One month after the hearing, a corrected COMPAS was prepared which correctly indicated a score of "Low." This tends to correspond with the information adduced at the hearing that Petitioner's last Tier III infraction was in 2016, five years before the parole hearing. Contrary to Respondent's contention, Petitioner has not waived this issue, as it was raised on administrative appeal (*compare Matter of Rodriguez v Coughlin*, 219 AD2d 876 [4th Dept 1995]).

Second, Petitioner contends that the Board failed to consider Petitioner's corrected reentry plan in rendering its decision. Petitioner testified at his hearing that his parole file contained an incorrect release address - he testified that his counselor "did this wrong...the other [address] isn't put there," and that his "counselor said to fix it...when I arrived [at the hearing]." DOCCS later noted the error stating "Per our conversation the address noted on your Parole Board Report can be updated if you are granted a *De Novo* appearance.") In opposition, Respondent argues that the Board's decision did not deny release based on this erroneous information. Respondent's argument is incorrect, the Board specifically considered that the release plan and testimony as to the proposed residence were not consistent.

Third, Petitioner contends that the Board failed to meaningfully consider Petitioner's citizenship status. Petitioner argues that the Board relied upon an incomplete parole file that did not include the deportation order or a copy of Petitioner's birth certificate, which he claims would show that he was born in Westchester, New York. Petitioner further established that DOCCS is in possession of his birth certificate, and that he and his counsel have attempted to secure it. In response, Respondent submits a copy of the deportation order, but does not otherwise address Petitioner's argument that DOCCS is in possession of his birth certificate showing his place of birth.

Fourth, Petitioner contends that the Board failed to give due consideration to recommendations of the sentencing judge, the district attorney, and Petitioner's criminal defense attorney. In response, Respondent contends that it made a diligent effort to obtain this information

and no response was received. Respondent submitted the letters sent to the sentencing judge, the district attorney, and defense counsel in 1994 together with an affidavit that the sentencing minutes could not be located. The Board is obligated to consider the recommendations of the sentencing court, the district attorney and the attorney who represented the inmate (9 NYCRR 8002.2[d][7]). An affidavit from the court reporter indicating that the minutes cannot be located is sufficient evidence of diligence in connection with the Board's efforts to obtain the minutes (*see Matter of Santiago v New York State Div. of Parole*, 78 AD3d 953 [2d Dept 2010]).

This Court's role is not to usurp the decision making authority statutorily vested in the Board of Parole. It only has the authority to determine whether the Board considered the relevant statutory factors in making its final determination (*see Matter of Russo, supra)*. However, here, Petitioner demonstrated that the Board reached its determination to deny parole on erroneous and incomplete information (*see Plevy v Travis*, 17 AD3d 879 [3d Dept 2005]; *Matter of Lewis v Travis*, 9 AD3d 800 [3d Dept 2004]).

Based upon the foregoing,

ORDERED that the petition is granted and the February 9, 2021 determination of the Board of Parole denying parole release is hereby vacated. It is further

ORDERED that Petitioner shall appear for a *de novo* parole release interview within 90 days of the date of this decision and order; and it is further

ORDERED that the Board of Parole shall be provided with the corrected COMPAS; corrected release plan, and Petitioner's birth certificate; and shall consider whether the sentencing judge imposed a sentenced less than the statutory minimum.

The foregoing constitutes the decision and order of the Court.

Dated: March 23, 2022
Poughkeepsie, New York

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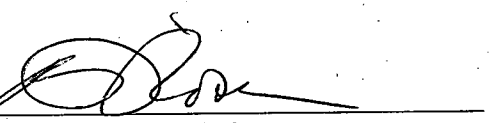

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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