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Decisions in Art. 78 Proceedings

Article 78 Litigation Documents

Decision in Art. 78 proceeding - Foy, Kenneth (2022-08-11)

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

KENNETH FOY,

Petitioner,

-against-

DECISION, ORDER AND
JUDGMENT

TINA STANFORD,

Index No.: 2022-51827

Respondent.

The following papers were read on Petitioner's Article 78 proceeding:

NOTICE OF PETITION
PETITION
EXHIBITS A – E

ANSWER AND RETURN
EXHIBITS 1-11

REPLY AFFIRMATION

Petitioner brings this CPLR Article 78 proceeding challenging a determination of the Board of Parole (the "Board") which denied his request for parole release. Following two separate but related incidents that occurred in December 2001, Petitioner pleaded guilty in New York County Court to Attempted Murder in the Second Degree, Assault in the First Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree. Petitioner was then convicted following a plea of guilty of Attempted Murder in the First Degree. He was sentenced to 19 years to life imprisonment. Petitioner's convictions stem from him assaulting a woman, when she tried to escape, he shot her in the leg, neck and face, leaving his victim paralyzed from the neck down. Petitioner fled the scene and was located the next day by police at a friend's apartment. Before being apprehended, he repeatedly fired a gun at police, hitting one officer in his ballistics helmet. Petitioner was shot five times during the altercation.

Petitioner appeared before the Board for his first parole board release interview on May 4, 2021. Following the interview, the Board issued a written determination denying discretionary release. The Board determined that 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. Petitioner was ordered held for 24 months with a reappearance in April 2023. At the time of his interview, Petitioner was 54 years old and had been incarcerated for approximately 20 years. Petitioner timely perfected his administrative appeal, which was dismissed on March 14, 2022. Thereafter, Petitioner commenced this Article 78 proceeding.

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 the 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 Matter of Huntley v Evans*, 77 AD3d at 947; *Matter of King v New York State Div. of Parole*, 190 AD2d 423 [1st Dept 1993], *aff’d* 83 NY2d 788 [1994]). 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]; *see Campbell v Stanford*, 173 AD3d 1012, 1015 [2d Dept 2019]). “Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript” (*Campbell v Stanford*, 173 AD3d at 1015).

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. A COMPAS assessment was prepared in connection with Petitioner’s May 4, 2021 appearance before the Board.

Petitioner contends that (1) the Board’s decision was arbitrary and capricious and based solely on the circumstances of the offense; (2) the Board’s reasoning for denying parole was not

supported by the record; and (3) the Board departed from his COMPAS score without providing an individualized reason.

The record before the Court reveals that the Board considered the statutory factors set forth in Executive Law §259-i. The final determination to deny parole release included the Board's statement that Petitioner's release would not be compatible with the welfare of society and would deprecate the seriousness of his crimes of conviction. Although Petitioner had an exemplary record of institutional achievements, had an improved disciplinary history with no misbehavior reports for over 10 years, and his COMPAS assessment indicated he was a low risk for felony violence, arrest and criminal involvement, the Board stated it "remains concerned about your shallow remorse and self-absorption." Although Petitioner does not attribute his behavior to alcohol consumption, he acknowledged that he is an alcoholic and had been heavily drinking the night before the first offense. Petitioner submitted letters to the Apology Bank for both of his victims, as well as to his now-wife. (He was hiding in her apartment when he exchanged gun fire with the police. She was present and unaware that he had shot a woman the evening prior). The record reveals that Petitioner expressed self-reflection and personal growth from participating in various programs while incarcerated. The Board did not focus entirely on Petitioner's conduct during the commission of the subject offenses but considered Petitioner's institutional record, and COMPAS score in reaching its determination. Thus, the Board's determination was not based exclusively on the seriousness of the crimes he committed, was made in accordance with statutory requirements and was not "irrational" or "bordering" on impropriety. The Board advised Petitioner to "TAKE THIS TIME TO GAIN FURTHER INSIGHT INTO YOUR BEHAVIOR." Under these circumstances, the court is without authority to substitute its judgment for that of the Board or to order a *de novo* hearing. Petitioner is eligible for rehearing in April of 2023. Therefore, it is

ORDERED that the petition for an order vacating the Board's determination dated May 4, 2021 denying Petitioner parole release is denied.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: August 10, 2022
Poughkeepsie, New York

ENTER:



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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