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Decisions in Art. 78 Proceedings

Article 78 Litigation Documents

Decision in Art. 78 proceeding - Leary, Edward (2022-07-25)

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

EDWARD LEARY,

Petitioner,

DECISION AND ORDER

-against-

Index No.: 2022-51602

TINA M. STANFORD, Chair of the New York State
Parole Board,

Respondent.

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

NOTICE OF PETITION
PETITION
EXHIBITS A - E

ANSWER AND RETURN
EXHIBITS 1 - 11

AFFIRMATION IN REPLY (Not considered as it was submitted after the return date)

Petitioner brings this CPLR Article 78 proceeding challenging a determination of the Board of Parole (the "Board") which denied his request for parole release. Petitioner was convicted in 1996 after a jury trial of two counts of Attempted Murder in the Second Degree, 13 counts of Assault in the First Degree, two counts of Criminal Possession of a Weapon in the Third Degree, and one count of Assault in the Second Degree. He was sentenced to a term of 8 1/3 to 25 years on the attempted murder charges, 5-15 years on all assault first degree charges, and 2 1/3 to 7 years on all remaining charges for an aggregate term of 25 years to 50 years. His convictions stem from two separate incidents. On December 15, 1994, Petitioner created a home-made incendiary device using a mayonnaise jar and kerosene. He traveled from his home in New Jersey to Brooklyn and planted the device on a subway train bound for Manhattan. The device was found by a teenager, and it later exploded injuring the teenager and his friend. On December 21, 1994, Petitioner brought another home-made incendiary device onto a New York City subway, which was crowded with people. Petitioner indicated that he had been traveling the train looking for a place to put the device to cause hysteria of some sort when he accidentally detonated it. Petitioner, as well as many of the individuals on the train were seriously burned and injured. Petitioner fled the scene, but

eventually required medical attention. He attempted to elude capture by posing as a victim but was later arrested. At trial, the jury rejected Petitioner's defense that he had suffered a psychotic break caused by the combination of prescribed psychiatric medications.

Petitioner appeared before the Board for his second parole release interview on October 5, 2021. Following the interview, the Board issued a written decision denying parole and ordered Petitioner held for 18 months with a reappearance set for March 2023. Petitioner's administrative appeal was denied, and this proceeding followed. At the time of his interview, Petitioner was 76 years old and had been incarcerated for approximately 25 years.

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 Matter of 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]; *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 October 5, 2021 appearance before the Board.

At the conclusion of the hearing, the Board issued a decision denying parole. The decision states that the Board determined that if released there was a reasonable probability that Petitioner would not live and remain at liberty without violating the law, and that his release would be incompatible with the welfare of society.

Petitioner contends that (1) the Board departed from his COMPAS score without providing an individualized reason; (2) the Board's decision was arbitrary and capricious and based solely on the circumstances of the offense; and (3) the Board's reasoning for denying parole was not supported by the record.

In its Decision, the Board commended Petitioner's clean prison disciplinary history, programmatic and academic achievements, work as a teacher's aide, post release residential and employment plans, and letters of support. The Board also notes that Petitioner's COMPAS risk assessment indicates a low risk to re-offend.¹ However, the Board then stated

This panel departs from your low-risk score of felony violence due to the instant offense, in which through your criminal behavior you showed great disregard for human life. You were aware of the potential harm the incendiary device you created could cause and claimed during the interview that you wanted the devices to create big noise and attract attention. You engaged in criminal conduct which impacted an entire community.

Petitioner argues that the Board violated its regulatory and statutory requirements by failing to explain its departure from COMPAS.

9 NYCRR §8002.2(a) provides that

[i]n making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, "Department Risk and Needs Assessment"). *If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.* [Emphasis added].

The transcript is clear that the Board expressly stated that it was departing from Petitioner's COMPAS assessment. Accordingly, 9 NYCRR §8002.2(a) requires that it specify the scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. The Board specified that it was departing from Petitioner's low felony violence score based upon the circumstances of the underlying offense. Citing to *Voii v Stanford*, Sup Ct, Dutchess County, May 13, 2020, Acker, J., Index No., 2020-50485, Petitioner argues that this is insufficient and warrants a *de novo* hearing. In *Voii*, the Board departed from the petitioner's

¹ A review of the COMPAS Risk Assessment annexed to the Petition confirms that Petitioner scored "low" or "unlikely" in all categories.

COMPAS score based upon the “tragic reckless nature of the crimes themselves.” The Board did not specify which scale from which it was departing. The Court held that

[E]ven assuming the Board’s generic statement identified the scale from which it departed, the explanation given for the departure is not “individualized.” The Board asserts that it is departing from COMPAS because of the “tragic reckless nature of the crimes themselves.” However, the COMPAS Risk Assessment contains twelve categories, none of which involves the nature of the underlying crimes. Thus, the alleged “individualized” reason provided by the Board for the departure is unrelated to any scale contained in the COMPAS Assessment [Footnote omitted].

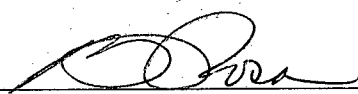
Here, the Court notes that contrary to Petitioner’s assertion, the Board’s determination to deny parole release was not solely based on the circumstances of the offense. The Board also considered that Petitioner minimized his responsibility for the offense, instead shifting blame to a purported discredited psychiatrist and mix of psychiatric medication that was prescribed, and that Petitioner had minimum insight into the motivation for his conduct. The Board also found that Petitioner “do[es] not intend to seek mental health services upon release”. His response to the Board’s inquiries was somewhat vague as to whether he would seek mental health services upon release. Accordingly, it is hereby

ORDERED that the petition to vacate and annul the October 5, 2021 determination denying parole release as arbitrary and as affected by an error of law is denied.

The foregoing constitutes the decision and order of the Court.

Dated: July 25, 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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