Decision in Art. 78 proceeding - Lopez, Adrian (2023-02-28)

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**
In the Matter of the Application of

ADRAIN LOPEZ

Petitioner,

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

- against -

TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,

Respondent.

DECISION & ORDER

Index No.: EF2022-2532

Supreme Court, Ulster County

Present: James P. Gilpatric, J.S.C.

Appearances:

Angela Albertus, Esq.
Attorney for Petitioner
9728 3rd Avenue
Brooklyn, New York 11209

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
By: David C. White, Assistant Attorney General, of Counsel

Gilpatric, J.:

Petitioner commenced this CPLR Article 78 proceeding seeking review of the determination by the New York State Board of Parole ("Parole Board" or "Board") on February 15, 2022 that denied his application for discretionary parole release. Respondent has answered the petition and requests the petition be denied and the matter dismissed in its entirety.

Petitioner was convicted of Murder in the second degree and sentenced 22 years-to-life and twelve counts of Assault in the first degree and sentenced 5 to 15 years for those counts. Petitioner

appeared before the Board of Parole for his reappearance on February 15, 2022 and was denied discretionary release (Answer Exhibit E). Petitioner administratively appealed on June 14, 2022 and the Appeals Units issued its decision affirming the Parole Board's determination on August 25, 2022 (Answer, Exhibit "G" and "H"). Petitioner then commenced this action.

Petitioner argues, *inter alia*, that the Board of Parole: 1) focused on the seriousness of the instant offense; 2) did not consider the statutory factors; 3) concluded that the petitioner lacked insight and remorse is not supported by the record; 4) decision was conclusory and lacked detail, and; 5) decision constitutes an impermissible resentencing (Petition). The petitioner also raised several new arguments in this proceeding including: a) the Board's decision failed to explain its departure from low risk COMPAS scores; b) the Board demonstrated bias by questioning petitioner about the use of an interpreter; c) the Board engaged in improper and impermissible badgering of petitioner; d) the Commissioners improperly considered their own penal philosophy, and; e) the Board's decision was a forgone conclusion (Answer, Petition).

In 2011, Executive Law § 259-c (4) was amended to require the Parole Board to "establish written procedures for its use in making parole decisions as required by law," and provides that "[s]uch written procedures shall 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, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (L. 2011, ch. 62, part C, sub-part A, § 38-b). In addition, Executive Law § 259-i (1) was repealed, and Executive Law § 259-i (2)(c) was amended to consolidate into one section the complete list of factors that the Parole Board is required to consider in reviewing applications for discretionary parole release (id., §§ 38-f; 38-f-1). However, the latter amendment did not result in a substantive change in the criteria which the Parole Board should consider in making its determination.

As it stands now and as relevant here, Executive Law § 259-i (2) (c) (A) provides:

> 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 law. In making the parole release decision, the procedures adopted pursuant to [Executive Law § 259-c (4)] shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate; . . . (v) any statement made to the

> board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; . . . (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 pre-sentence 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. . . .

Further, settled law holds: "[P]arole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements of Executive Law § 259-i" (Molinar v New York State Div. of Parole, 119 AD3d 1214 [3rd Dept 2014]; Matter of Tafari v Evans, 102 AD3d 1053, 1053 [3d Dept 2013]; lv denied 21 NY3d 852).

The essence of petitioner's argument is that the Board failed to consider all the necessary statutory factors, instead only focusing on the seriousness of his instant offense and petitioner's criminal record. Mixed with this argument is petitioner's claim that the Board did not properly consider his low risk COMPAS Risk and Needs Assessment scores. Petitioner contends that, had it seriously considered this instrument, the Board could not have come to the conclusion it did, arguing that this demonstrates that the Board's determination is arbitrary and capricious.

Contrary to petitioner's view, and after the Court's review of all of the submissions, the record establishes that the Board "incorporate[d] risk and needs principles to measure the rehabilitation" of petitioner in his appearance before it (L. 2011, ch. 62, part C, sub-part A, § 38-b). The submissions indicate that the Board had for its review a copy of the petitioner's COMPAS Re-entry Risk Assessment, his Case Plan, programming, proposed release plans and criminal history, along with considering has institutional adjustment (Matter of Garfield v Evans, 108 AD3d 830, 830-831 [3d Dept 2013]).

As outlined above and as evident in the record before it, the Board did consider the relevant factors. After reviewing all of the records, the Board felt that petitioner's release would be incompatible with the welfare of society. For instance, in addition to the serious nature of the underlying crime, the Board considered the petitioner's criminal history, institutional efforts including completion of Alcohol and Substance Abuse Treatment, Aggression Replacement training and other rehabilitative programs, vocational training, and no disciplinary infractions since his last board appearance, his health challenges and release plans, and petitioner's lack of insight and remorse after the commission of the crimes (see Matter of Maricevic, 86 AD3d at 880; Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3d Dept 2008]). Also, the Board is not required to articulate in its determination every factor it considered (see Matter of Vaughn v Evans, 98 AD3d 1158, 1160 [3d Dept 2012]; Matter of Rodriguez v Board of Parole,

100 AD3d 1179, 1180 [3d Dept 2012]; see Matter of Maricevic v Evans, 86 AD3d 879, 880 [3d Dept 2011]).

Given the foregoing, the Court has considered any remaining contentions and need not address them.

Accordingly, it is,

ORDERED and ADJUDGED that the Article 78 petition is denied; and dismissed.

This shall constitute the Decision and Order of the Court. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

JPG JSC

Dated: ~~March~~ February 24, 2023
Kingston, New York

ENTER,

JSC

JAMES P. GILPATRIC, J.S.C.

PAPERS CONSIDERED: Notice of Petition, dated December 17, 2022; Petition, dated December 16, 2022, with exhibits; Answer, dated January 30, 2023, with exhibits; Memorandum of Law, dated January 30, 2023; Affirmation in Reply of Angela Albertus, Esq., undated, filed on February 3, 2023.