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Decisions in Art. 78 Proceedings

Article 78 Litigation Documents

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### Decision in Art. 78 proceeding - Jimenez, Geral (2023-04-13)

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To commence the 30-day statutory time period 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 DUTCHESS**

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In the Matter of the Application of

**DECISION & ORDER**

GERAL JIMENEZ,

Index No. 2022-53625

Petitioner,

-against-

TINA M. STANFORD, Chairperson,  
New York State Board of Parole,

Respondent.

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

-----X  
**ACKER, J.S.C.**

The Court considered the following papers on the application of Petitioner Geral Jimenez (“Petitioner”) pursuant to CPLR Article 78 challenging Respondent’s denial of his release to parole supervision:

- Amended Notice of Petition-Verified Petition-Exhibits A-J-
- Memorandum of Law in Support.....NYSCEF Doc. #s 1-18
- Answer and Return-Exhibits 1-13<sup>1</sup> .....NYSCEF Doc. #s 19-32
- Memorandum of Law in Reply.....NYSCEF Doc. #34

Petitioner commenced the instant proceeding seeking an Order reversing the November 9, 2021 Decision of the Parole Board which denied his release. He further seeks (i) a *de novo* interview before different Board Commissioners than those who presided at the November 9,

<sup>1</sup> The Court also reviewed, *in camera*, the confidential documents submitted by Respondents as Exhibit 2 (entire exhibit) and portions of Exhibits 3 and 10.



2021 Parole Interview, as well as those who determined the administrative appeal; (ii) that the interview be held within thirty (30) days of the granting of the Petition and (iii) an Order directing Respondent to provide Petitioner's counsel with all documents and other materials and information in Petitioner's parole file at least 14 days prior to the rescheduled interview.

Petitioner is currently incarcerated at Fishkill Correctional Facility, serving an indeterminate sentence of 17 years to life upon his guilty plea in 2007 to Murder in the Second Degree. On November 4, 2004, Petitioner stabbed his supervisor to death after he was fired for stealing food from the restaurant that employed him as a delivery person. Although he fled the scene, he turned himself in two months later and pled guilty. While the prosecutor sought a sentence of 20 years to life, the Judge chose to impose a lesser sentence of 17 years to life.

The instant application was brought as a result of the Parole Board's November 9, 2021 parole release denial. Petitioner timely filed an administrative appeal and the denial was affirmed on July 18, 2022. This was Petitioner's first appearance before the Parole Board.

Petitioner maintains that the Board's Decision should be reversed and a *de novo* interview be ordered for the following reasons: (1) the Board failed to explain in detailed and non-conclusory terms how it considered and weighed each of the required factors in denying parole; (2) the Board departed from Petitioner's low COMPAS risk scores without providing individualized reasons for doing so; (3) the Board relied on conclusions that were inconsistent with the undisputed facts in denying parole to Petitioner; and (4) the Board improperly considered materials unrelated to the factors set forth in 9 NYCRR §8002.2 and NY Executive Law §259-i(2)(c)(A), as well as materials that it did not adequately describe, preventing Petitioner from responding to the contents.



It is well settled that judicial review of a determination of the Parole Board is narrowly circumscribed. *Campbell v. Stanford*, 173 AD3d 1012, 1015 [2d Dept. 2019], *leave to appeal dismissed*, 35 NY3d 963 [2020]. A Parole Board determination to deny early release may only be set aside where it evinces “irrationality bordering on impropriety.” *Id.* Although the Parole Board is required to consider the relevant statutory factors as identified in Executive Law §259-i(2)(c)(A), it is not required to address each factor in its decision or accord all the factors equal weight. *Id.* “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.” *Id.*

New York Executive Law §259-i(2)(c)(A) provides that:

[d]iscretionary 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.

Further, pursuant to New York Executive Law §259-i(2)(c)(A)(i)-(viii), and as relevant to the circumstances herein, the Parole Board is required to consider the following in making a parole decision: the inmate’s institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; any deportation order issued by the federal government against the incarcerated individual while in the custody of the department; release plans including community resources, employment, education and training and support services available to the inmate, the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court and the district attorney and the pre-sentence probation report.



“If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.” Executive Law §259-i(2)(a).

**Petitioner’s November 9, 2021 Interview and Respondent’s Decision**

The transcript of Petitioner’s parole interview is annexed to the Petition as Exhibit B and to the Answer and Return as Exhibit 4 (hereinafter referred to as “Interview Transcript”). The Board’s Decision denying parole is contained at pages 17-20 of the Interview Transcript (hereinafter referred to as “Decision”).<sup>2</sup>

In reviewing the Decision in the context of the Interview Transcript for the reasons stated herein, the Court finds that Petitioner has demonstrated that the Board’s determination to deny him release evinces irrationality bordering on impropriety.

Pursuant to 9 NYCRR §8002.2(a), “[i]f 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.”

In its Decision, the Board stated that

[i]n considering your release we also reviewed the risk and needs assessment, which indicates that your risk to re-offend is low. This Panel departs from your low-risk score of felony violence, due to the instant offense in which your criminal behavior showed a callous disregard for the life you took.

Petitioner maintains that the Board failed to comply with 9 NYCRR §8002.2(a) because although the Board indicated that it was departing from COMPAS, the Board’s reliance on Petitioner’s 2004 crime was irrational.

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<sup>2</sup> Respondent also provides a separate “Parole Board Release Decision Notice” as part of Exhibit 5 that contains virtually the same content as the transcript, but is dated December 27, 2021.



Respondent addresses this argument with just two sentences. The first correctly states the law. The other, however, argues that the Board complied with that law when it noted the “mixed COMPAS scores” and “petitioner’s disregard for the sanctity of human life and poor disciplinary record.” Answer and Return, ¶19. Leaving aside the fact that this statement is inaccurate,<sup>3</sup> Respondent fails to show how the Board’s Decision provided an “individualized reason” in compliance with the regulation.

While the Board complied 9 NYCRR §8002.2(a) by identifying the category from which it departed (risk of felony violence), the Board was required to provide an individualized reason for this departure. The stated reason is “due to the instant offense in which your criminal behavior showed a callous disregard for the life you took.” Thus, the sole basis given for the Board’s departure from COMPAS is the nature of Petitioner’s crime. Although the Board is entitled to place more emphasis on the serious nature of Petitioner’s crime, “where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.” *Huntley v. Evans*, 77 AD3d 945, 947 [2d Dept. 2010]; *see also Ferrante v. Stanford*, 172 AD3d 31, 37 [2d Dept. 2019] (“the Board may not deny an inmate parole based solely on the seriousness of the offense.”).

Moreover, as the Board identified “risk of felony violence” as the category from which it was departing, the individualized reason given must be related to that category. Simply stating the nature of Petitioner’s prior felony<sup>4</sup> falls short of providing an individualized reason pursuant to 9 NYCRR §8002.2(a).

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<sup>3</sup> The Board never stated that Petitioner’s COMPAS scores were mixed. Similarly, the Board did not explicitly identify Petitioner’s “poor” disciplinary record as its basis for departing from COMPAS.

<sup>4</sup> According to the Parole Board Report, this was Petitioner’s first criminal act and first New York State incarceration.



Petitioner also maintains that the Board departed from Petitioner's low COMPAS score on the Prison Misconduct category and failed to provide an individualized reason. This is based upon the Board's finding in the Decision that due to Petitioner's "disregard for the rules" while he was incarcerated, the Board was concerned that Petitioner "would be unwilling to be law abiding in society" and that this would be incompatible with the welfare of society.

Respondent does not address this argument directly in the Answer. Nevertheless, it is uncontested that the COMPAS document reports Petitioner's Prison Misconduct as "low" and that Petitioner's last disciplinary infraction was in 2018. By relying on Petitioner's alleged "disregard for the rules," the Board departed from Petitioner's low Prison Misconduct COMPAS score and failed to provide an individualized basis for such departure.

Established case law makes clear that absent a convincing demonstration to the contrary, the Parole Board is presumed to have acted properly in accordance with statutory requirements. *Jackson v. Evans*, 118 AD3d 701, 702 [2d Dept. 2014]. As the evidence before this Court demonstrates that the Parole Board herein did not comply with the requirements of 9 NYCRR §8002.2(a), judicial intervention is warranted because this departure from the regulation evinces irrationality bordering on impropriety. *See Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 AD3d 672, 673 [2d Dept. 2018].

While the foregoing provides sufficient basis to vacate the Board's Decision, the Court further finds that the Decision should be vacated because the Board relied upon factually inaccurate conclusions in denying parole. The Decision states that during the interview, Petitioner "did not present as having a clear understanding for [his] need for continued participation" in substance abuse treatment upon his release. This conclusion is unsupported, and, frankly, contradicted by the record.



During the Interview, the Board asked Petitioner “Why would your need for services upon release be probable? Wouldn’t you think it would be definite?”<sup>5</sup> Significantly, Petitioner agreed that his need for such services was definite. The Board then stated that “I would say that it’s highly probable that you would need re-entry substance abuse treatment.” The record also demonstrates that Petitioner indicated that he intends to continue to seek mental health services on his release and stated that his family had already contacted a location in Santo Domingo.<sup>6</sup>

Given Petitioner’s clear acknowledgement that he required, and intended to seek, treatment for substance abuse and mental health should he be released, the Board’s conclusion that he did not have a clear understanding of the need for such services is unsupported by the record and serves as an additional basis to vacate the November 9, 2021 Decision.

Finally, Petitioner seeks an Order directing Respondent to provide Petitioner’s counsel with all documents and other materials and information in Petitioner’s parole file at least 14 days prior to the rescheduled interview. As this relief is unopposed, it is granted. Respondent shall provide Petitioner’s counsel with all documents in the Parole file to which Petitioner is legally entitled at least 14 days before the *de novo* interview.<sup>7</sup>

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

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<sup>5</sup> Under the “Substance Abuse” category in the COMPAS document, it is noted that Petitioner committed his crime while high/drunk and has a history of alcohol problems. The COMPAS document further concludes that Petitioner is “at risk for substance abuse problems.” Petitioner scored a “3” (Probable) for ReEntry Substance Abuse. However, based upon a review of the Interview Transcript and the Decision, it appears that the Board interpreted this score as meaning that Petitioner’s need for continued treatment upon his release was “probable.”

<sup>6</sup> Petitioner is subject to a deportation order to the Dominican Republic.

<sup>7</sup> It is unrealistic to grant this relief and order the *de novo* interview be held within 30 days. Accordingly, the Court will allow 60 days for Respondent hold the *de novo* interview.



ORDERED that the Petition is granted and the November 9, 2021 determination is annulled; and it is hereby

ORDERED that the matter is remitted to Respondent for a *de novo* parole release interview and review which complies with all applicable statutes and regulations; and it is further

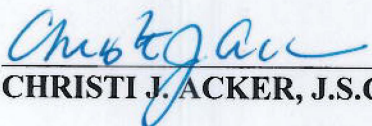
ORDERED that the *de novo* interview shall be held before a panel consisting of members who were not involved in the November 9, 2021 interview; and it is further

ORDERED that Respondent provide Petitioner's counsel with all documents in Petitioner's Parole file to which Petitioner is legally entitled at least 14 days before the *de novo* interview; and it is further

ORDERED that said interview is to be conducted within sixty (60) days of the date of this Court's Decision and Order, and a decision is to be issued within fifteen (15) days of the date of such hearing.<sup>8</sup>

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
April 13, 2023

  
CHRISTI J. ACKER, J.S.C.

To: All Counsel via NYSCEF

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<sup>8</sup> As Petitioner's first interview had to be adjourned because there was no Spanish interpreter, Respondent shall ensure that an interpreter is available for the *de novo* interview.