Decision in Art. 78 proceeding - Davis, Jerry (2023-05-24)

STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY
In the Matter of the Application of
JERRY DAVIS,

Petitioner,

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

Decision & Order
Index No.: EF2022-1662

-against-

TINA STANFORD, CHAIRWOMAN, THE
NEW YORK STATE BOARD OF PAROLE,

Respondent.

Supreme Court, Ulster County
Motion Return Date: January 17, 2023

Present: Julian D. Schreibman, JSC

Appearances:

Rebecca T. Engel, Esq.
Attorney for Petitioner
1138 Ocean Avenue, #5F
Brooklyn, New York 11230

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
By: Steve H. Nguyen, Assistant Attorney General, of Counsel

Schreibman, J.:

Petitioner, an incarcerated individual in the care and custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this CPLR Article 78 proceeding[1] to challenge the determination by the New York State Board of Parole

[1] The Court notes petitioner initially filed a petition with exhibits, and thereafter, pursuant to stipulation, filed an amended notice of petition. The petition and amended petition are addressed

(hereinafter "Board") denying him parole release on or about September 7, 2021. The determination was administratively appealed and affirmed on May 2, 2022. Petitioner seeks a *de novo* hearing before a new panel and related relief. Petitioner alleges, *inter alia*, that the Board violated regulatory and statutory requirements when it failed to explain its departure from petitioner's low risk-needs "COMPAS" score, failed to explain how it considered the necessary parole decision-making factors, and failed to explain its determination in non-conclusory terms. Respondent denies petitioner's allegations, opposes the application, and requests the matter be dismissed.

Petitioner was convicted of Murder in the Second Degree and sentenced to a term of incarceration of 15 years to life. The instant proceeding arose after denial of petitioner's release following his second appearance before the Board.

It is well-established that "[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." (*Matter of Molinar v NYS Div. of Parole*, 119 AD3d 1214, 1215 [3rd Dept. 2014] [internal citations omitted]; *see also e.g. Matter of Delrosario v Evans*, 121 AD3d 1152 [3rd Dept. 2014]; *Matter of Tafari v Evans*, 102 AD3d 1053 [3rd Dept. 2013] *lv denied* 21 NY3d 852 [2013]). To that end, the Board's determination will not be disturbed by the Court absent a showing that the decision was irrational "bordering on impropriety," and the determination was thus arbitrary and capricious. (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]). In reviewing the Board's

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as motion sequence 1 and 2, respectively, on NYSCEF. However, the Court notes that based upon the submissions, there were no additional documents submitted with the amended notice of petition, and therefore considers the amended notice with the petition and exhibits submitted in motion sequence 1. The Court further notes respondent's submissions were not filed on NYSCEF. The Court has considered the hard copy submissions, including those documents submitted solely for in-camera inspection, and notes that a hard copy affidavit of service on respondent's counsel was provided.

decision, the Court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute. (*See Matter of Thwaites v New York State Board of Parole*, 34 Misc.3d 694 [Sup. Ct. Orange County 2011]). "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." (*Matter of Campbell v Stanford*, 173 AD3d 1012, 1015 [2nd Dept. 2019]). Absent a convincing demonstration to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements and "judicial intervention is warranted only where there is a showing of irrationality bordering on impropriety." (*Hamilton v NYS Div. of Parole,* 119 AD3d 1268 [3rd Dept. 2014] [internal citations and quotation marks omitted]).

As set forth in Executive Law § 259-i (2) (c) (A): "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." This provision also sets forth the factors to be considered by the Board in making its determination, and includes the following:

> (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....

Petitioner's argument here is, in essence, that the Board failed to consider all the necessary statutory factors, focusing instead on the seriousness of the instant offense and petitioner's criminal record. Petitioner further submits the Board improperly relied on its own and the District Attorney's interpretation of the validity of petitioner's remorse, and failed to sufficiently consider petitioner's low risk COMPAS Risk and Needs Assessment scores, along with positive aspects of his institutional record. Respondent maintains that it adhered to its mandate by properly considering all statutory factors and afforded each the appropriate weight in making its determination, which was not conclusory.

The record reveals that the Board considered the relevant statutory factors and followed the appropriate guidelines in denying Petitioner's request for parole release. Upon review of all of the submissions, the Court finds the record establishes that the Board "incorporate[d] risk and needs principles to measure the rehabilitation" of petitioner in his appearance before it. (Executive Law §259-c[4]). The submissions indicate that the Board had for its review a copy of petitioner's COMPAS Re-entry Risk Assessment, case plan, programming, proposed plans for release and criminal history, and considered his institutional adjustment.

Further, as illustrated in the transcript of petitioner's interview, the Board addressed the following: the instant offense; reasons for committing the instant offense (dispute over a woman and petitioner's "way of thinking when [he] feel[s] challenged...[he] resort[s] to violence"); age at the instant offense; ramifications of this offense and impact on the victim's family; facts of the instant offense; fact that petitioner was on parole for seven months at the time of the instant offense; petitioner's work on himself and his way of thinking since reentry to the prison system; COMPAS scores; case plan; goals, tasks and activities; employment while incarcerated; positive

family relationships; letters of support and letters of assurance, including from the community and NYSDOCCS staff; post-release employment; letter from family (nephew), certificates and achievements; plans upon release; desire to become a certified personal trainer; remorse; program evaluations; completion of all available programs, including acquiring a GED; clean disciplinary record; sentencing minutes; petitioner's statement on his own behalf; letters from an official; and other relevant factors during the discussion.

Upon consideration, the Board rendered a decision denying petitioner's request for parole release, and stated that "to release you at this time would so deprecate the serious nature of your crime as to undermine respect for the law." The Board continued by explaining that instant offense was petitioner's second NYSDOCCS incarceration resulting in his conviction for Murder 2nd, and noted petitioner shot the victim "multiple times with a loaded semi-automatic pistol in the head and chest" and that the shooting occurred after petitioner "went to an 'associate' obtained the weapon and returned to kill [his] victim." In considering these factors, the Board found that petitioner "had ample time, to reconsider [his] violent response to the argument. Moreover, [petitioner] had only been on parole for several months at the time of the instant offense." The Board also acknowledged the positive aspects of petitioner's incarceration, including his programming, low COMPAS risk and needs assessment scores, from which it did not depart, rehabilitation efforts, and case plan, and specifically applauded petitioner for his "execution of the use of the OMH suggestion" following his prior request and denial of parole. Ultimately, however, in considering the requisite factors, including statements in opposition, the Board held that "discretionary release shall not be granted merely as reward for good conduct or efficient use of duties while confined" and that "though your incarceration has provided you an opportunity for maturity and introspection, the panel remains significantly concerned that despite your lengthy

confinement you present limited insight by failing to wholly consider the depth and extent of harm you caused."

As outlined above and illustrated by the Record, it cannot be said that the Board's decision evinces "irrationality bordering on impropriety." (*Matter of Molinar,* 119 AD3d at 1216 [internal citations and quotation marks omitted]). Although the Board heard petitioner's positive factors, the Board also heard about the crime committed by petitioner, who left the scene to obtain the murder weapon, and returned to shoot and kill another man over an argument about a woman. Notably, "even when a petitioner's institutional behavior and accomplishments are exemplary, the Board may place particular emphasis on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered." (*Hamilton*, 119 AD3d at 1272). "The Board is not required to give each factor equal weight and was free to emphasize the serious nature of the instant offense." (*Matter of Berry v New York State Div. of Parole*, 50 AD3d 1346 [3rd Dept. 2008]; *see also Matter of Montane v Evans*, 116 AD3d 197, 203 [3rd Dept. 2014]; *Schendel v Stanford*, 185 AD3d 1365 [3rd Dept. 2020]). Additionally, the Board may consider recommendations of the district attorney. (*See Applegate v New York State Bd. of Parole*, 164 AD3d 996, 997 [3rd Dept. 2018]). Further, the Board is not required to articulate in its determination every factor it considered. (*See Matter of Vaughn v Evans*, 98 AD3d 1158, 1160 [3rd Dept. 2012]; *Matter of Rodriguez v Board of Parole*, 100 AD3d 1179 [3rd Dept. 2012]; *Matter of Maricevic v Evans*, 86 AD3d 879, 880; *Matter of Leung v Evans*, 120 AD3d 1478[]). Thus, the Court finds the Board considered the necessary factors and the decision sufficiently detailed. (*See Matter of Zhang v Travis*, 10 AD3d 828, 829 [3rd Dept. 2004]).

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic. Accordingly, it is hereby

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

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Ulster County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: May 24, 2023
Kingston, New York

ENTER,

JULIAN D. SCHREIBMAN, JSC

Papers considered: Notice of Petition, Amended Notice of Petition, Petition and Memorandum of Law in Support by Rebecca T. Engel, Esq. dated August 22, 2022, with Exhibits 1-12; and Respondent's Answer and Memorandum of Law in Support by Steve H. Nguyen, Esq., Assistant Attorney General, of Counsel, dated January 17, 2023, with Exhibits A-M.