At a Special Term of the Sullivan County Supreme Court, held in and for the County of Sullivan, in the Village of Monticello, New York, on the 3rd day of ~~April~~ May, 2017

PRESENT: HON. STEPHAN SCHICK
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF SULLIVAN

In the Matter of the Application of
ROBERT SETH HAYES, # 74-A-2280

Petitioner,

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

DECISION AND ORDER
INDEX NO. 200-2017

-against-

NEW YORK STATE BOARD OF PAROLE, TINA STANFORD, CHAIRPERSON

Respondent.

APPEARANCES: EVA ROSAHN, ESQ.
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New York, New York 10007
Attorney for Petitioner

HON. ERIC T. SCHNEIDER MAN
Attorney General for the State of New York
(Jeane L. Strickland Smith, Esq., AAG of Counsel)
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Attorneys for the Respondent

SCHICK, J.:

Petitioner commenced the instant CPLR Article 78 proceeding challenging respondent's determination which denied his application for parole release and held him for an additional 24 month period.

Petitioner is in the custody of the New York State Department of Corrections and Community Services (DOCCS) serving an indeterminate term of imprisonment. Petitioner was convicted of crimes committed in three separate incidences. In 1974, he was found guilty of Murder in the death of a transit authority police officer. The petitioner was also convicted of the crimes of Possession of a Weapon, Robbery in the First Degree and Grand Larceny in the Third Degree for stealing a vehicle at gunpoint from another victim. In June, 1974 the petitioner was sentenced to a term of 25 years to life on the murder conviction and concurrent lesser terms on the remaining convictions. In July 1974, the petitioner was involved in an incident whereby he shot and wounded four police officers. Petitioner was found guilty of four counts of Attempted Murder and was sentenced to a term of 25 years to life on each count. In 1975, the petitioner pled guilty to the crime of Possession of a Weapon for firing a gun at two police officers on patrol.

The petitioner appeared before the Parole Board for his tenth parole hearing on June 14, 2016. After the interview, the Board issued its decision denying petitioner's release and ordered petitioner held for 24 months. The Panel concluded that:

> After carefully reviewing your record, a personal interview, and due deliberation of this Panel concludes that discretionary release is not presently warranted as your release would be incompatible with the welfare of society. You stand convicted of the serious offenses of Att. Murder (5 counts), Murder, Criminal Possession of a Weapon and Grand Larceny.
> Your criminal history indicates that these crimes of conduct throughout

1973 in which you targeted police, was your first contact with the law. The Panel takes note of all statutory factors including your rehabilitative efforts and programming, risk and needs assessment, case plan, re-entry plans, letters of support, community opposition, sentencing minutes and your disciplinary record. You have not had a disciplinary since 1999.
The Panel reviewed your present and past parole packets and even the psychological risk assessment submitted previously by Joel Schoir, PhD, on your behalf.
The Panel notes that the community opposition to your release is extremely forceful, strong, recent and consistent. You targeted police. Police officers are the last line of defense in a civil society.

Petitioner filed a Notice of Appeal with the Division of Parole Appeals Unit on September 1, 2016. On or about October 11, 2016, the appeal was denied by the respondent. Petitioner now brings this CPLR Article 78 proceeding.

Initially, the petitioner alleges the Board failed to comply with Executive Law § 259-c(4) which requires the Board to use procedures to measure an inmate's rehabilitation and the likelihood of success upon release. The petitioner maintains his parole denial should be vacated.

In 2011, Executive Law § 259-c(4) was amended to require the Board to "establish written procedures for its use in making parole decisions" and to consider the person's likelihood of success upon release to parole supervision. Executive Law § 259-i(2)(c) was amended to consolidate into one section the complete list of factors the Board is required to consider in evaluating applications for parole release. The amendments to Executive Law § 259-i(2)(c) became effective in administrative hearings conducted on or after October 1, 2011.

Petitioner's parole release interview was subject to the requirements of Executive Law § 259-c(4). The petitioner alleges the decision of the Board was irrational and did not consider all of the requirements of Executive Law § 259-i(2)(c). (Matter of Thwaites v. NYS Board of Parole, 34

Misc3d 694 [Sup. Ct. 2011]).

A review of the record indicates the Board considered the requirements of the Executive Law relating to parole release. The amendments to Executive Law 259-i(2)(c) did not result in a substantiative change in the criteria which the Parole Board should consider in rendering its decisions. (Montane v. Evans, 116 AD3d 197 [3rd Dept. 2014]).). This Court finds the factors that must be considered for release on parole were adequately considered here. The record does not demonstrate that the Parole Board failed to consider the statutory factors set forth in Executive Law § 259-i(2)(c). (Goldberg v. New York State Bd. of Parole, 103 AD3d 634 [2nd Dept. 2013)].

As stated 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. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article 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 interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate; (v) any statement made to the board by the crime victim or the victim's representative..."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, will not be disturbed. (Matter of Neal v. Stanford, 131 AD3d 1320 [3d Dept. 2015]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review. (Matter of Hamilton v. New York State Div. of Parole, 119 AD3d 1268 [3rd Dept. 2014]). Furthermore, only a "showing of irrationality bordering on impropriety" on

the part of the Parole Board has been found to necessitate judicial intervention. (Matter of Silmon v. Travis, 95 NY2d 470 [2000], *quoting* Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board. (Delacruz v. Annucci, 122 AD3d 1413 [4th Dept. 2014]). With these principles in mind, the Court turns to the merits of petitioner's case.

Petitioner argues the decision to deny him parole was irrational, arbitrary and capricious, and resulted in a gross abuse of discretion. A Board's determination denying parole release will not be disturbed unless there is a "showing of irrationality bordering on impropriety" (Matter of Silmon v. Travis, 95 NY2d at 476). The Court finds the Parole Board considered the relevant factors in making its decision and its determination was supported by the record. The decision was sufficient to apprise petitioner of the reasons for the denial of discretionary release. A review of the transcript of the parole interview reveals that, in addition to the instant offenses, attention was paid to such factors as petitioner's institutional programming and his plans upon release. He was given an opportunity to make a statement in support of his release. The Board also had petitioner's sentencing minutes, Inmate Status Report, Pre-Sentence Investigation Report, a COMPAS Reentry Risk Assessment and a COMPAS Case Plan which details petitioner's institutional adjustment, programming, disciplinary record, proposed release plans, criminal history, risk factors and the facts of the current offense. Petitioner claims his COMPAS risks levels were low. Contrary to petitioner's claim, the COMPAS assessment is but one of many documents the Board now considers when making its parole release decisions. (Matter of Thomas v. Evans, 109 AD3d 1069 [3rd Dept. 2013]). While the Board must consider the conclusion reached through use of the COMPAS assessment, it may draw a different conclusion regarding the risks posed by the petitioner's release. (Matter of

Rivera v. New York State Div. of Parole, 119 AD3d 1107 [3rd Dept. 2014]).

The Court notes the Board was free to place emphasis on the seriousness of petitioner's instant offenses. (Matter of Montalvo v. New York State Bd. of Parole, 50 AD3d 1438 [3d Dept. 2008]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one. (Matter of Vigliotti v. State of New York Executive Div. of Parole, 98 AD3d 789 [3rd Dept. 2012]; (Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3d Dept. 2008]). The determination is not rendered improper by the Parole Board's failure to "expressly discuss each of these guidelines in its determination" (Matter of King v. New York State Div. of Parole, 83 NY2d 788 [1994]). In addition, Executive Law § 259-i(2) does not grant parole release merely as a reward for petitioner's good conduct or achievements while incarcerated. (Matter of Mentor v. New York State Division of Parole, 87 AD3d 1245 [3rd Dept. 2011]). The Court finds it was not irrational for the Board to place more weight on instant offenses than petitioner's institutional accomplishments and plans for release. (Matter of Hamilton v. New York State Division of Parole, 119 AD3d at 1273-1274). Petitioner has failed to meet his burden showing the Board did not consider the relevant statutory factors or that the decision was irrational, arbitrary, capricious or contrary to law.

Petitioners conclusionary allegation that the Board's decision was predisposed to denying him release is without merit. (Matter of Connelly v. New York State Division of Parole, 286 AD2d 792 [3rd Dept. 2001], appeal dismissed 97 NY2d 677 [2001]). In addition, petitioner's allegations of bias on the part of the Board are not supported by the record and petitioner failed to offer proof that the outcome of this case flowed from the alleged bias. (Matter of Hernandez v. McSherry, 271 AD2d 777 [3rd Dept. 2000], lv denied 95 NY2d 769 [2001]). The Parole Board is required to

consider the same factors each time the petitioner appears for a parole release hearing. (Matter of Williams v. New York State Division of Parole, 70 AD3d 1106 [3rd Dept. 2010[, lv denied 17 NY3d 709 [2010]). The record discloses the Board rendered its determination after considering the full record, including the hearing testimony, the petitioner's institutional background, his achievements, his criminal history and release plans. (Matter of Marziak v. Alexander, 62 AD3d 1227 [3rd Dept. 2009]; Matter of Salahuddin v. Dennison, 34 AD3d 1082 [3rd Dept. 2006]).

Petitioner's claim that he was denied due process has been examined and found to be without merit. Executive Law § 259-i, does not create an entitlement to release on parole and therefore does not create interests entitled to due process. (Paunetto v. Hammock, 516 F. Supp 1367 [US Dist. Ct., SDNY, 1981]). There is no due process right to parole. (Russo v. New York State Board of Parole, 50 NY2d at 73). Also, there is no due process right to an inmate obtaining a statement as to what he should do to improve his chances for parole in the future. (Matter of Francis v. New York State Division of Parole, 89 AD3d 1312 [3rd Dept. 2005]). Nor does the denial of parole constitute double jeopardy. (Matter of Patterson v. Goord, 1 AD3d 845 [3rd Dept. 2003]). Petitioner's allegation that the denial of parole was akin to re-sentencing is without merit. (Matter of Murray v. Evans, 83 AD3d 1320 [3rd Dept. 2011]).

Petitioner maintains the Board should not have considered community opposition to his parole release. Petitioner claims as a "result of the solicitation of emails by the N.Y.C. Police Benevolent Association (PBA) in furtherance of their explicit position that no one convicted of homicide of a police officer should ever be released from prison, no matter the sentencing judge's recommendations or the parole applicants's particular facts." Petitioner contends Executive Law 259-i does not allow the Board to consider opposition statements from the public. Petitioner claims

the statements from the public may contain erroneous information that should not have been considered by the Board.

Executive Law § 259-i (2)(c)(A) provides a crime victim or his/her closest surviving relative an opportunity to present a statement to the Parole Board containing information relevant to the inmate and the crime victim. Executive Law § 259-i [2][c][B] provides "where a crime victim or victim's representative . . . or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential." Executive Law § 259-i does not restrict the opportunity of the public from submitting a statement or comment in regard to an inmate's parole release request as the statute refers to "other person". The Board may Consider statements from "other persons" in addition to a victim or his/her family.

This Court is mindful of the holding in Matter of Comfort v. New York State Board of Parole, 101 AD3d 1450 [3rd Dept. 2012]). In Comfort, the Court reversed the denial of parole release finding the Board relied upon significant letters in opposition to petitioner's release that contained an erroneous characterization of petitioner's conviction and "it was error for the Board to credit those tainted letters." The petitioner in this proceeding has not alleged or demonstrated that the Board considered any erroneous letters or emails from the public that influenced their decision in denying parole release. Petitioner's allegation that the Board may have considered erroneous information supplied by public opposition is merely speculative. It would not be unusual for the NYC PBA to oppose parole release of those inmates who have been convicted of the murder of a police officer. The allegation that the Board considered erroneous information provided by community opposition is unfounded. The petitioner was denied parole release for reasons other than community opposition.

(Matter of Ebbs, 54 AD2d 611 [4th Dept. 1976], appeal denied 40 NY2d 897 [1976]). The Parole Board denied parole release pursuant to Executive Law § 259-i based upon the many factors discussed herein.

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was in accordance with the statutory requirements and was not excessive, irrational, arbitrary, capricious or in violation of lawful procedure. (Matter of Russo v. NYS Board of Parole, 50 NY2d at 77). The Petition is therefore dismissed.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for respondent. All original supporting documentation is being filed with the Sullivan County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.
ENTER.

Dated: ~~April~~ May 3, 2017
Monticello, New York

STEPHAN SCHICK
Supreme Court Justice

Papers Considered:

1. Notice of Petition undated; Verified Petition dated February 1, 2017 with annexed exhibits A-D;

2. Verified Answer and Return dated March 7, 2017 with annexed exhibits 1-12;

3. Affirmation of Eve Rosahn, Esq. dated March 16, 2017.