STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HENRY E. HOWARD,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST7257 Index No. 7547-06

Appearances: Henry E. Howard
Inmate No. 81-A-3910
Petitioner, Pro Se
Mid-Orange Correctional Facility
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Warwick, NY 10990-0900

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Mid-Orange Correctional Facility, has commenced the

instant CPLR Article 78 proceeding to review a determination of respondent made on February 21, 2006 in which petitioner was denied discretionary release on parole. Petitioner is serving an indeterminate sentence of 15 years to life pursuant to a conviction after trial of the crime of murder in the second degree[1]. Petitioner indicates that he has accepted full responsibility for his crime. He maintains that he has attempted to take advantage of the therapeutic, vocational and educational programs available to him. He obtained a certificate in paralegal studies and has taken college courses. He avers that of all the people considered for parole, he belongs to a group that is the least likely to recidivate if released, since persons convicted of homicide have a low rate of recidivism. He maintains that the determination of the Parole Board is not supported by any evidence, let alone substantial evidence. In his view, there is no proof that he would recidivate if released; and that no proof that he currently has a propensity to commit a crime. In support of this contention he makes reference to his institutional programing. He criticizes the Parole Board for improperly devoting too much time during the parole interview discussing the crime for which he was incarcerated, and ignoring and/or down playing his outstanding institutional record. In petitioner's view, by reason of the absence of aggravating circumstances which could properly preclude release, he is entitled to be released immediately.

The petitioner contends that the Parole Board has violated his right to Equal Protection under the law, as he is similarly situated to all prior inmates who have been

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[1]Petitioner was also convicted of the crime of criminal possession of a weapon in the second degree, for which a definite term of one year was imposed.

granted release. He argues that the parole denial determination was governed by an Executive policy to deny parole to all violent felony offenders; and was the result of political pressure. Petitioner further asserts that the determination violated his right to due process of law. As a part of this argument, he maintains that the Parole Board failed to articulate a rational basis for its decision. Petitioner also asserts that the Parole Board relied upon incorrect information in that Commissioner Vizzie commented during the parole interview that this was his fifth time in state prison, when in fact it was his first time.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole denied. You argued with the victim and then shot him in the chest with a handgun. The victim was killed. The record reflects that you and the victim had an ongoing dispute. Consideration has been given to your program participation and acceptable disciplinary record. Following review and consideration, this parole panel has concluded that discretionary release is inappropriate as it would deprecate the severity of the instant offense and serve to undermine respect for the law."

The Court must first address a threshold issue. Simultaneously with the filing of the petition in this matter the petitioner made a motion for discovery pursuant to CPLR § 408, including a request to conduct depositions of members of the Division of Parole and to serve a demand for the production of documents. The petitioner also wishes to identify former inmates similarly situated to him who were granted parole, to assist him in establishing the merit of his equal protection argument. In addition, separate and apart from the motion for

discovery, the petitioner has served a notice to admit pursuant to CPLR 3123 upon the respondent. The notice to admit required respondent to admit or deny the following matters (which are presented here in summary form): that petitioner has satisfied all of the rehabilitative goals set for him by the New York State Department of Correctional Services; that there is strong support in the community for petitioner's release; that respondent's determination does not include a probabilistic assessment as to the likelihood that petitioner will recidivate if released.; that the New York State Board of Parole's determination is not supported by any evidence, let alone substantial evidence; that respondent has granted parole to numerous persons convicted of the same offense as the petitioner here; that respondent has not articulated a rational basis for denying petitioner parole while, at the same time, it has granted parole to persons who are similarly situated to the petitioner; that respondent has allowed political pressure to infect its decision-making process; that respondent used incorrect information to sway their determination when [the Parole Board] noted on the record that "this is your fifth time in state prison".

Under CPLR § 408, discovery is permitted only in the discretion of the Court. The Court finds that petitioner has failed to demonstrate a reasonable need for the conduct of discovery proceedings, whether by deposition or through production of documents (see Matter of Zulu v Egan, 1 AD3d 649, 649 [3rd Dept., 2003]). The Court finds that the motion must, in all respects, be denied.

With regard to petitioner's notice to admit, as recently stated by the Appellate

Division, "'[t]he underlying purpose of a notice to admit is to eliminate from dispute those matters about which there can be no controversy; it is not to be used to request admission of material issues or ultimate issues or facts'" (Eddyville Corporation v Relyea, 35 AD3d 1063, 1066 [3rd Dept., 2006], quoting Howlan v Rosol, 139 AD2d 799, 802 [3rd Dept., 1988] and citing CPLR 3123 [a]). In this instance, petitioner attempted to utilize the notice to admit to request admission of material issues or ultimate issues or facts. The Court finds that the demands contained in petitioner's notice to admit were improper. Under the circumstances, respondent's response to the notice to admit was proper.

Turning to the merits, 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 []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, vocational skills acquired while in prison, letters submitted in support of his release, his disciplinary record, and his plans upon release. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of

Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996). 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 (see Matter of Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

The Court notes that because there was no formal evidentiary hearing in this instance,

the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination is in violation of lawful procedure, affected by an error of law, arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Pell v Bd. of Educ., 34 NY2d 222 [1974]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy (and/or through political pressure) mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]).

Turning to petitioner's argument that the Parole Board relied upon erroneous

information (that this was his fifth state term of imprisonment), the Court notes that Commissioner Vizzie made the following comment during the parole interview: "This is your fifth time in state prison. First felony conviction..." While it is clear that Commissioner Vizzie made a mistatement of fact, it is equally evident that if this was petitioner's first felony conviction (which it was) that he could not possibly have been incarcerated in state prison on four prior occasions. Moreover, as respondent points out, petitioner failed to correct this mistatement of fact during the parole interview. The Court finds that petitioner failed to establish that the alleged incorrect fact resulted in a violation of petitioner's constitutional rights or that they involved matters which affected respondent's decision to deny parole (see, Matter of Rossney v New York State Board of Parole, 267 AD2d 648, 649 [3rd Dept., 1999]; Matter of Howard v New York State Bd. of Parole, 272 AD2d 731 [3rd Dept., 2000]; Matter of Richburg v New York State Division of Parole, 284 AD2d 685, 686 [3rd Dept., 2001]); Matter of Morel v Travis, 278 AD2d 580 [3rd Dept., 2000], appeal dismissed 96 NY2d 752 [2001]).

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is

examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir., 2001]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). The Court, accordingly, finds no due process violation.

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see, Matter of Tatta v State of New York, Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

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

The Court finds the decision of the Parole Board was not irrational, in violation of

lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

Accordingly, it is

ORDERED, that petitioner's motion for leave to conduct discovery proceedings be and hereby is denied; and it is further

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: May 16, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated November 20, 2006, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 9, 2007, Supporting Papers and Exhibits
3. Corrected Answer dated January 9, 2007
4. Petitioner's Reply verified January 26, 2007

5. Notice of Motion for Leave to Conduct Disclosure dated October 12, 2006
6. Notice to Admit Pursuant to CPLR §§7804(a), 408 & 3123 dated October 12, 2006
7. Response to Notice to Admit Truth of Facts dated January 11, 2007