STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of THOMAS DUEMMEL,

Petitioner,

-against-

NEW YORK STATE DIVISION 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 # 01-08-ST8701 Index No. 1776-08

Appearances: Thomas Duemmel
Inmate No. 91-B-2570
Petitioner, Pro Se
Oneida Correctional Facility
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Oneida Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent made on May 21, 2007 to deny petitioner discretionary release on parole. The petitioner is serving an aggregate indeterminate term of twelve to thirty-six years upon conviction of multiple counts of sodomy in the first degree, sexual abuse in the first degree, unlawful imprisonment in the second degree, and incest.

Among the many arguments set forth in the petition, petitioner contends that the parole determination was arbitrary and capricious in that it constitutes a re-sentencing and results in a period of incarceration that exceeds petitioner's guideline range. In support of the petition, petitioner points to his institutional programming, which includes completion of a Sex Offender Program, Aggression Replacement Training, Alcohol and Substance Abuse Training, and a Victim Awareness Program, and his good disciplinary record. Petitioner maintains that he possesses vocational skills in several areas relating to construction, and that he will be able to reside with his parents upon his release.

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

> "Denied - Hold for 24 months, next appearance date: 05/2009. Conditions of Release/Staff Instructions/Reasons for Denial: Following careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered. Your instant offenses in Ontario County, from 1988 to 1990, involved you and your co-defendant wife sexually abusing three (3) different children. Your criminal history includes prior motor vehicle related offenses, and also a 1990

> Acting in a Manner Injurious to a Child. Your institutional programming demonstrates progress and achievement which is noted. Your disciplinary record reflects one Tier 2 report. Your program accomplishment is noted, however, the extreme deviancy indicated in the instant offenses is of particular concern to this panel.
> Your discretionary release, at this time, would thus not be compatible with the welfare of society at large, and would tend to deprecate the seriousness of the instant offenses, and undermine respect for the law."

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 Bd. 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 Div. of Parole, 294 AD2d 726 [3rd Dept., 2002]). The Court notes that because there was no formal 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 Board of Educ., 34 NY2d 222 [1974]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and that its determination was supported by the record. A review of the transcript of the parole interview reveals that in addition to the instant offense and petitioner's criminal history, attention was paid to such factors as petitioner's program accomplishments, disciplinary record, and post-release plans. The petitioner was afforded ample opportunity during the parole interview to explain why he is entitled to release. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and satisfy 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 Div. of Parole, 199 AD2d 677 [3rd

Dept., 1993]). Contrary to petitioner's assertions, there is no requirement that the Board provide an inmate with guidelines to improve his chances of securing parole at his next parole appearance (see Matter of Freeman v New York State Div. of Parole, 21 AD3d 1174, 1175 [3rd Dept., 2005]).

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 Div. of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v New York State Bd. of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863 [3rd Dept., 1996]). The Parole Board is neither required give equal weight to each factor that it considered in determining the inmate's application, nor to expressly enumerate or discuss each one (see Matter of Farid v Travis, 239 AD2d 629, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Div. 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 Div. of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law § 259-i [2] [c] [A], other citations omitted).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing are conclusory and without merit (see Matter of Bockeno v New York State Parole Bd., 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Exec. Dept. Bd. of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A [Sup. Ct., Westchester County, 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the sentencing court (see Matter of Silmon v Travis, 95 NY2d 470, 476, supra; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006], lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

With respect to petitioner's argument that he has served time in excess of the guideline range (see 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Div. of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]); as such, they are not binding on parole determinations. Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

The record does not support petitioner's assertion that the Parole Board's decision was predetermined consistent with an alleged political policy of systematically denying parole to all sex offenders. Moreover, the Third Department has dismissed any similar allegations

dealing with the denial of parole to violent felony offenders (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York, Div. of Parole, 294 AD2d 726, supra; 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]; Matter of Ward v New York State Div. of Parole, 26 AD3d 712, 713 [3rd Dept., 2006]; Matter of Hakim-Zaki v New York State Div. of Parole, 29 AD3d 1190 [3rd Dept., 2006]). Thus, the Court finds no merit to this argument.

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 Executive Law § 259-i [2] [a]; Matter of Tatta v State of New York, Div. of Parole, 290 AD2d 907, supra).

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 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 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/Judgment with notice of entry.

ENTER

Dated: July 31, 2008
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 17, 2008, Petition, Supporting Papers and Exhibits
2. Answer dated May 28, 2008, Supporting Papers and Exhibit
3. Affirmation of Assistant Attorney General of Counsel Adele Taylor Scott dated May 28, 2008