STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
GEORGE BABA ENG, 77-A-4777,

Petitioner,

-against-

HENRY LEMONS, JR. Acting Chairman,
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 # 01-09-ST0056 Index No. 1981-09

Appearances: Norman P. Effman, Esq.
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(C. Harris Dague, Assistant Attorney General
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DECISION/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at the Attica Correctional Facility, has commenced the instant CPLR Article 78 proceeding for review of a determination by the Board of Parole denying his application for discretionary release. Respondent Henry Lemons, Jr., Acting Chairman of the New York State Division of Parole, opposes the petition, seeking its

dismissal.

In 1977, the petitioner was sentenced to a 25-year to life term of imprisonment following a guilty verdict on a charge of Murder in the Second Degree. On January 29, 2008, the petitioner appeared for the fourth time before the Parole Board seeking discretionary release. At that interview, the Parole Board had a lengthy discussion with the petitioner about the underlying circumstances of his conviction, which occurred while the petitioner was on parole. The Parole Board also discussed the petitioner's prior criminal history, which included a previous homicide conviction. During the interview, the petitioner acknowledged his guilt for the underlying crime and discussed his efforts to change following his approximate 31 years of incarceration. Among other things, the Parole Board noted that the petitioner had several supporters who had expressed such sentiment to the Parole Board. The Board also noted the petitioner's clean disciplinary record. The petitioner discussed at great length his plans to work with youth upon his potential release, hoping to impart on them the lessons he has learned.

Following the hearing, the Parole Board issued its decision in which it denied the petitioner discretionary release and issued a 24-month hold. That decision provided:

> After a review of the record and interview, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society and would do deprecate the serious nature of the crime as to undermine respect for the law. This decision is based on the following factors: Your I.O. is:
> Murder 2 in which you shot your victim repeatedly causing his death over a small gambling debt. Your criminal history also includes shooting and killing a victim in New Jersey. Note is made of your extensive programming, education, clean disciplinary record, letters of support, expression of remorse

> and sentencing minutes. The senseless, brutal and merciless nature of your offense is further aggravated by your prior killing in New Jersey and failure to benefit from prior efforts at rehabilitation. Parole is denied (Parole Board Release Decision Notice [dated 2-4-08], Answer, Exhibit F).

Subsequently, the petitioner administratively appealed the Parole Board's decision. After the Appeals Unit did not issue a timely determination regarding that appeal, the petitioner commenced this instant CPLR article 78 proceeding for review of the Parole Board's decision. In this proceeding, the petitioner first argues that the Appeals Unit's failure to issue a timely determination regarding his administrative appeal violates his constitutional rights. Otherwise, he argues that the Parole Board (1) failed to consider the required statutory factors, relying, instead, on the instant offense and the petitioner's criminal history; (2) improperly considered false or sealed information in the petitioner's criminal history; (3) had a conflict of interest or acted unfairly in determining this matter since panel members had either sat on a prior panel or participate in administrative appellate review of a prior determination; and (4) failed to consider the petitioner's medical condition. Also, the petitioner seeks disclosure of certain confidential information submitted by the respondent in this proceeding.

As a threshold matter, the failure of the Appeals Unit to render a decision within four months operates only to permit the inmate to resort to intermediate judicial review without being met with a defense of failure to exhaust administrative remedies (see NYCRR 8006.4 [c]; see also Matter of Lord v State of New York Exec. Dept. Bd./Div. of Parole, 263 AD2d 945 [3rd Dept 1999], lv denied 94 NY2d 753; Matter of Tyler v Travis, 269 AD2d 636 [3rd Dept 2000]). That would be the case here. Thus the Court discerns no violation of a

constitutional or statutory right.

Otherwise, Executive Law § 259-i (2) (c), in relevant part, provides that the following factors shall be considered by the Board in making a decision regarding discretionary parole release:

> "(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 while in the custody of the department of correctional services . . . ; and (v) any statement made to the board by the crime victim or the victim's representative . . ."

Further, where, such as here, a petitioner's minimum period of imprisonment was not fixed pursuant to the provisions of Executive Law § 259-i (1), but rather by the sentencing Court, the Board must also consider the following factors from Executive Law § 259-i (1) (a):

> "(i) 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 and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. . . . " (see also Matter of Santos v New York State Div. of Parole, 234 AD2d 840, 840 [3d Dept 1996]).

"It is well settled that parole decisions are discretionary and will not be disturbed so long as the statutory requirements set forth [above] are met" (Matter of Turner v Dennison, 24 AD3d 1074, 1074 [3d Dept 2005]; see Matter of Mendez v New York State Bd. of Parole, 20 AD3d 742, 742 [3d Dept 2005]). Moreover, "[j]udicial intervention is warranted only

when there is a 'showing of irrationality bordering on impropriety'" (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]; see Matter of Cartagena v New York State Bd. of Parole, 20 AD3d 751, 752 [3d Dept 2005], lv dismissed 6 NY3d 741; Matter of Farid v Travis, 17 AD3d 754, 754 [3d Dept 2005], lv dismissed 5 NY3d 782).

Here, for the reasons discussed below, the Parole Board has considered the relevant statutory factors in exercising its discretion to deny the petitioner parole (see Matter of Abascal v New York State Bd. of Parole, 23 AD3d 740, 741 [3d Dept 2005]). Contrary to the petitioner's argument, the Parole Board may consider the seriousness of the underlying crime as well as the petitioner's overall criminal background and is "not required to give equal weight to the statutory factors it considered in reaching its discretionary determination" (Matter of Freeman v New York State Div. of Parole, 21 AD3d 1174, 1175 [3d Dept 2005]). Furthermore, the Parole Board did not act improperly by considering the same statutory factors as it had during the petitioner's previous appearances (Matter of Nelson v New York State Parole Bd., 274 AD2d 719, 719-720 [3d Dept 2000]; see also Matter of Flecha v Travis, 246 AD2d 720, 720 [3d Dept 1998]). The record also reflects that a memo was placed in the petitioner's file to correct any errors in arrest reports and the minutes of the parole interview indicates that the Parole Board was aware of the type of weapon used in the shooting (accord Matter of Grune v Board of Parole, 41 AD3d 1014, 1014-1015 [3d Dept 2007]). Additionally, there is nothing in the record that establishes that the Parole Board relied on any misinformation in determining this matter (see Matter of Gardiner v New York State

Div. of Parole, 48 Ad3d 871, 872 [3d Dept 2008]).

Further, the interview transcript, the determination, and the record before the Parole Board demonstrate that the Board also considered, inter alia, the petitioner's institutional achievements, his clean disciplinary record, post-release plans, and the pre-sentence report (see Matter of Watford v Travis, 16 AD3d 850, 851 [3d Dept 2005]). In addition, the Parole Board allowed the petitioner an opportunity to discuss any other matter he felt warranted the Parole Boards' attention (see Matter of Serna v New York State Div. of Parole, 279 AD2d 684, 684-685 [3d Dept 2001]). The Parole Board also considered the sentencing minutes and a recommendation by the District Attorney's Office.

The Court is unpersuaded by the petitioner's argument that he did not receive a fair parole interview due to comments made by one of the Commissioners. As the petitioner acknowledges, those comments and questions were in response to a statement made by the petitioner contained in the sentencing minutes that the Parole Board is statutorily required to review. Further, the petitioner was afforded an opportunity to respond to the comments.

Likewise, the petitioner's argument that the parole interview was unfair since both panel members had either been on a prior panel or had sat in administrative appellate review is without merit (see Matter of Di Chiaro v Hammock, 87 AD2d 957, 958 [3d Dept 1982]). There is neither a statutory nor a regulatory requirement that an inmate appear before a de novo panel each time he or she appears before the Parole Board (see Executive Law § 259-i; 9 NYCRR 8002.2). Furthermore, the facts here do not show a violation of 9 NYCRR 8006.4 which prevents a Parole Board Member from participating in administrative appellate review

after serving on the panel in the same appearance (see Matter of Brunner v Russi, 182 AD2d 1136, 1136 [4th Dept 1992]). Finally, the Court notes that there is a "presumption of honesty and integrity accorded to administrative body members" (Matter of Yoonessi v State Bd. of Professional Med. Conduct, 2 AD3d 1070, 1071 [3d Dept 2003], lv denied 3 NY3d 607 [2004]).

As to the petitioner's contention that the letter from the District Attorney submitted to this Court for in camera review be disclosed, Executive Law § 259-i (2) (c) (B) requires that name and address of persons submitting materials to the Board be kept confidential. Further, the Third Department in an analogous situation, has held that such materials are not required to be disclosed under the Freedom of Information Law since such a letter would constitute "a nonfinal recommedation[] by [an] employee[] of one agency to assist decision makers in another agency in reaching a decision" (Matter of Grigger v New York State Div. of Parole, 11 AD3d 850, 852 [3d Dept 2004], lv denied 4 NY3d 704 [2005]). That Court further reasoned that such nondisclosure would ensure "that persons in advisory roles, such as prosecutors, are able to express their opinions freely to agency decision makers" (id.). That reasoning equally applies here; thus, disclosure of the District Attorney's letter is not warranted (id.).

As to the pre-sentence report, such a "report 'is confidential and is not to be made available to any person . . . except where specifically required or permitted by statute or upon specific authorization of the court'. Where no statutory authority is cited, a petitioner may be entitled to disclosure of the report 'upon a factual showing for the need thereof'" (Matter

of Gutkaiss v People, 49 AD3d 979, 979 [3d Dept 2008], quoting CPL 390.50 [1]) and Matter of Shader v People, 233 AD2d 717, 717 [3d Dept 1996]; see Matter of Blanche v People, 193 AD2d 991, 992 [3d Dept 1993]). Further, Third Department case law has allowed disclosure of a pre-sentence report for use in preparing for a Parole Board hearing (see Matter of Davis v People, 52 AD3d 997, 997 [3d Dept 2008]; Matter of Gutkaiss, 49 AD3d at 979-980). However, such disclosure was permitted in a proceeding commenced in the Sentencing Court pursuant to CPL 390.50; thus, the Court will deny such disclosure without prejudice to commence a proceeding in the proper Court (see Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Box 11 A, CPL 390.50; see e.g. Matter of Davis, 52 AD3d at 997; Matter of Gutkaiss, 49 AD3d at 979).

There is no merit to the petitioner's contention that the Parole Board failed to consider his medical history since it was noted in the record before the Board and, thus, was one of several factors that the Board had to balance in arriving at its decision (see Matter of Tatta v State of New York, 290 AD2d 907, 908 [3d Dept 2002], lv denied 98 NY2d 604). Notably, the petitioner never raised this issue with the Parole Board during his interview. Otherwise, the Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. Thus, since petitioner has failed to meet his burden of showing the Parole Board's determination exhibited irrationality bordering on impropriety, judicial interference is unwarranted (Matter of Silmon, 95 NY2d at 476; Matter of Farid, 17 AD3d at 754).

The Court has reviewed and considered the petitioner's remaining arguments and

contentions and finds them to be without merit.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

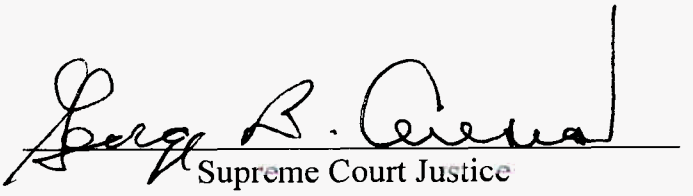
ORDERED and ADJUDGED that the relief requested is denied; and it is further

ORDERED and ADJUDGED that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered to the County Clerk for filing. The signing of this decision/order/judgment and the delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 30, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order to Show Cause filed March 17, 2009;
2. Petitioner verified March 13, 2009, with accompanying Exhibits;
3. Answer verified April 15, 2009, with accompanying Exhibits A-G;
4. Affirmation of C. Harris Dague, Esq., affirmed April 15, 2009;
5. Reply verified May 19, 2009.