STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ROGER P. ADAMS,

Petitioner,

-against-

GEORGE B. ALEXANDER, Commissioner of the Division of Parole; and ANDREW CUOMO, State Attorney General,

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-ST0113 Index No. 1642-09

Appearances: Roger P. Adams
Inmate No. 86-B-0415
Petitioner, Pro Se
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

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State of New York
Attorney For Respondent
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Albany, New York 12224
(C. Harris Dague,
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of Counsel)

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 dated February 20, 2008 to deny petitioner discretionary release on parole. In 1985 the petitioner was convicted of murder in the second degree and was sentenced to an indeterminate term of twenty years to life. During his incarceration he was convicted of two counts of assault in the second degree and sentenced to a term of two and one half to five years, running concurrently to each other but consecutively to the murder conviction. Among the many arguments set forth in the petition, petitioner contends that (1) the determination of the Parole Board was "excessive"; (2) the Parole Board placed undue emphasis on the crimes for which he was convicted, and failed to consider positive factors supporting his release; (3) the Parole Board's determination was stated in conclusory terms; (4) the Parole Board violated petitioner's due process rights; (5) the Parole Board determination was influenced by political pressure and public opinion; (6) there were errors in the hearing minutes which affected his due process rights; (7) the hearing was untimely; (8) the petitioner was not provided a "proper" hearing; (9) the parole determination did not have a sound and substantial basis in the record; (10) the Parole Board relied upon improper documentation during the parole interview; and (11) the Parole Board's decision was pre-determined.

The petitioner maintains that the Parole Board, in relying upon the seriousness of the crime for which he is incarcerated, has re-sentenced him to an additional term of imprisonment. He asserts that it was improper for the Parole Board to rely upon his poor institutional disciplinary record. In his view the Parole Board failed to consider his efforts at rehabilitation. He indicates that he successfully completed the ART and ASAT programs,

as well as programming and/or employment as an auto-mechanic, a sign-maker, a building maintenance worker, a porter, an industries worker, a pantry and mess hall worker, a program aide, a vocational drafting employee and a member of a paint crew.

The petitioner maintains that the Parole Board's decision was conclusory and non-factual. He argues that the Parole Board violated his rights to due process in that it followed an alleged policy of the administration of former Governor George Pataki to deny parole to violent felony offenders. He also asserts that the parole interview was untimely as it was not held at least one month prior to his parole date. He maintains that the transcript of the parole interview contains errors. He maintains that the parole interview was illegal in that only two members of the Parole Board were present.

The petitioner asserts that he has demonstrated his remorse for his crime, as shown by his programing in such areas as alternatives to violence. As evidence of his rehabilitation, he indicates he has made charitable contributions to (and participates in) Tomorrow's Children Marathon Fund. He also donates to the Make A Wish Foundation. He contends that his sentencing minutes are incomplete. In his view the Parole Board's decision was predetermined.

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

> "After a review of your rec ord, a personal interview, and deliberation, parole is denied. Your program completions and release plans are noted. The sentencing minutes you provided have also been considered. Your criminal conduct includes convictions for murder 2nd degree and assault 2nd degree. When this is considered with your poor disciplinary record, which includes numerous tickets for creating disturbances, violating direct orders, fighting and violent conduct; and required/relevant

> factors, it is concluded that your discretionary release at this time is incompatible with the welfare of the community and inappropriate at this time."

Turning first to a threshold issue, the Court notes that the petitioner has made a motion for assignment of counsel. The Court finds that his motion must be denied. In cases such as the instant one, there is no authority for the assignment of counsel without compensation (see, Matter of Smiley, 36 NY2d 433 [1975]; Wills v City of Troy, 258 AD2d 849, [3d Dept., 1999]).

Turning to the merits 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 De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept.,

2001]). 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 De La Cruz v Travis, supra). 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 and his plans upon release. He was afforded ample opportunity to speak on his own behalf. The transcript appears to be sufficient on its face, and is more than adequate for purposes of providing meaningful review. The Court finds that the transcript of the parole interview satisfied the requirements of Executive Law § 259-i (6) (see, Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept., 2000], lv denied 95 NY2d 753; People ex rel. Grimaldi v Warden, 174 AD2d 497 [First Dept., 1991], lv to appeal denied 78 NY2d 858; see also, Matter of Reynoso v Coombe, 229 AD2d 732, 733 [3rd Dept., 1996], lv denied 89 NY2d 801). In addition, under the rules of the Division of Parole, it is proper for the interview to be conducted by a panel of two Board members (see 9 NYCRR 8002.2 [b]).

The decision of the Parole Board 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 Siao-Pao, 11 NY3d 773 [2008]; 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 Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). 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).

With regard to the sentencing minutes, it appears from the record that the Division of

Parole made a good faith effort to obtain the minutes from the office of the Albany County Clerk, but that they are no longer available. Notably however, the petitioner submitted a reasonably complete copy of the sentencing minutes which reveals that Albany County Court Judge Joseph Harris harbored absolutely no sympathy for the petitioner. In particular Judge Harris expressly stated that he wanted any future Parole Board to know that the petitioner had reneged on his plea bargain by not cooperating with the prosecution, and that he had shown no remorse for his crime.[1] Under such circumstances the Court finds that there has been substantial compliance with Executive Law 259-i (2) (c) (A), in that relevant portions of the sentencing minutes were considered.

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of

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[1]Judge Harris stated the following: "My recommendation to the Parole Board is that when [petitioner's murder victim] rises from the grave and tells the Parole Board that it's all right with him for you to go free, that's soon enough." Incredibly, the petitioner commented during his parole interview ". . .the Judge. . . he didn't like me *for some reason*." (emphasis supplied)

petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; 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]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy 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]; Matter of Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dep., 2007]; Matter of Garofolo v Dennison, 53 AD3d 734 [3rd Dept., 2008]; Matter of MacKenzie v Dennison, ___ AD3d ___,866 NYS2d 384 [3rd Dept., October 22, 2008]). Nor does the Court find that there is any evidence that the Parole Board decision was otherwise predetermined. There is no evidence in the record that political pressure played a role in the Parole Board's determination..

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 arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). 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 contentions 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.

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, that petitioner's motion for assignment of counsel 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. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and 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: October 1, 2009
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2009, Petition, Supporting Papers and Exhibits
2. Petitioner's Affidavit In Support of Motion For Assignment of Counsel
3. Respondent's Answer dated May 12, 2009, Supporting Papers and Exhibits