STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of CHARLES VENTURA,

Petitioner,

-against-

ANDREA W. EVANS, CHAIRWOMAN & CEO
OF THE 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 # 01-11-ST2768 Index No. 3383-11

Appearances: Charles Ventura
Inmate No. 72-C-0114
Petitioner, Pro Se
Green Haven Correctional Facility
P.O. Box 4000
594 Route 216
Stormville, NY 12582

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adam W. Silverman,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Green Haven Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated May 18,

2010 to deny petitioner discretionary release on parole.

With respect to a preliminary procedural issue, the Court notes that the respondent made a motion to dismiss on grounds that the petitioner failed to comply with the service requirements contained in the order to show cause dated May 27, 2011. The petitioner thereafter secured an amended order to show cause (dated July 6, 2011), and re-served the respondent and the Attorney General The respondent thereafter served an answer to the petition which did not raise any jurisdictional defenses. Under the circumstances, the Court will deny the motion to dismiss as being moot.

Turning to the merits, the petitioner is serving two indeterminate terms of twenty-five years to life for two counts of murder first degree. Among the arguments set forth in the petition, the petitioner contends that the determination is arbitrary and capricious and an abuse of discretion. He points out that he has been before the Parole Board on seven previous occasions. He maintains that the transcript of the parole interview contains errors, and does not accurately reflect what was actually said. He complains that Commissioner Thomas Grant, who sat on this Parole Board, has sat on two previous Parole Boards, 2006 and 2008. He criticizes the Parole Board for imposing a twenty-four month hold, comparing this to a resentencing. The petition also complains that the Parole Appeals Unit failed to review his appeal within 120 days.

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: 05/2012
>
> "After a review of the record and interview, the panel has determined that if released at this time, that your release would

be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. This decision is based on the following factors: Your instant offense Murder (A-1) represents a continuation of a criminal history that includes prior conviction for burglary 3rd, aggravated harassment, and assault 3rd. You have continued to maintain a satisfactory disciplinary record. This panel notes your completion of facility orientation and your participation in ABE since your last parole Board appearance."

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 procedures 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 interactions 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 and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) 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 prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." (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]). 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 current employment, his health, his disciplinary record, and his plans upon release, which includes working on his brother's horse farm. He was afforded ample time to speak on his own behalf. 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 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 Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). 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 Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; 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).

Petitioner's claims that the determination to deny parole is tantamount to a resentencing 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., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]). 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 petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; 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 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]; Matter of Mentor v New York State Division of Parole, 67AD3d 1108, 1109 [3rd Dept., 2009]).

Likewise, the petitioner's argument that the parole interview was unfair since

Commissioner Thomas Grant had sat on two prior parole panels 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). In addition, 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]).

The Court finds that the transcript of the parole interview satisfied the requirements of Executive Law § 259-i (6), making possible a meaningful review of the actions of the Parole Board (see Matter of Mentor v New York State Division of Parole,67 AD3d 1108, 1109 [3rd Dept., 2009]; 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).

Lastly, 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 respondent's motion to dismiss is denied as moot; and it is

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: November 22, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 27, 2011, and Amended Order To Show Cause dated July 6, 2011, "Writ of Mandamus Petition", Supporting Papers and Exhibits
2. Respondent's Answer dated September 9, 2011, Supporting Papers and Exhibits
3. Petitioner's Letter dated September 23 2011
4. Petitioner's Letter dated October 12 2011

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit E, Confidential Portion of Inmate Status Report, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: November 22, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice