Matter of Banks v New York State Div. of Parole
2014 NY Slip Op 30790(U)
April 1, 2014
Sup Ct, Albany County
Docket Number: 5433-13
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
FRANK BANKS, # 87-A-1614,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION and ORDER
RJI NO.: 01-13-ST5159
INDEX NO.: 5433-13

NEW YORK STATE DIVISION OF PAROLE, TINA
MARIE STANFORD, CHAIRWOMAN,

Respondents.

Supreme Court Albany County All Purpose Term, February 7, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Frank Banks
Petitioner, Pro Se
87-A-1614
Otisville Correctional Facility
57 Sanitorium Road
P.O. Box 8
Otisville, New York 10963-0008

Eric T. Schneiderman, Esq.
Attorney General of New York State
Attorneys for the Respondents
Stephen M. Kerwin, AAG
Department of Law
The Capitol
Albany, New York 12224

TERESI, J.:

This is an Article 78 proceeding brought by Petitioner challenging Respondents' denial of parole release. The record reveals that during the interview the Board reviewed with Petitioner the circumstances of Petitioner's instant criminal offense, Petitioner's institutional history and programming, and his release plans.

The Board's actions are judicial in nature and may not be reviewed if done in accordance with the law (see Executive Law §259-i[5] see also Matter of Valderrama v Travis, 19 AD3d 904, 905 [3d Dept 2005]). Executive Law § 259-i(2)(c)(A) provides that discretionary release to parole supervision is not to be granted to an inmate merely as a reward for good behavior while in prison, but after considering whether "there is a reasonable probability that, if such an 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" (Matter of King v New York State Division of Parole, 83 NY2d 788, 790 [1994], affg 190 AD2d 423 [1st Dept 1993]). Decisions regarding release on parole are discretionary and will not be disturbed if they satisfy the statutory requirements (Executive Law § 259-i; Matter of Walker v New York State Div. of Parole, 203 AD2d 757 [3d Dept 1994]) and there is no showing of "irrationality bordering on impropriety" (Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Saunders v Travis, 238 AD2d 688 [3d Dept 1997]; Matter of Felder v Travis, 278 AD2d 570 [3d Dept 2000]).

The Court begins its analysis by declining to engage in a line-by-line, case-by-case response to Petitioner's 11 pages of boilerplate arguments. The Court has considered Petitioner's arguments and finds they are not valid, are unsupported, and in places rest on cases that have been superceded (see Matter of Montane v Evans, _ AD3d _, 2014 WL 958465, [3d Dept 2014]). Some of the alleged technical violations are not supported by any allegations of practical harm to Petitioner, were known to Petitioner prior to the hearing, and/or Petitioner

waived them by failing to raise them at a time when they could have been corrected by the Board.

Petitioner seeks to avoid shouldering his burden of demonstrating there has been a statutory violation by the Board or that the denial of parole release reflected "irrationality bordering on impropriety" by the Board. Petitioner has cited no statutory violation by the Respondent when denying parole release. Denial of parole release could not be arbitrary and capricious because Petitioner has not established that he would necessarily live and remain at liberty without violating the law, or that his release at this time is compatible with the welfare and safety of the community, or that his release at this time would not diminish the seriousness of his gunning down an individual who failed to turn over the receipts of the taxi company that Petitioner and his colleagues were robbing.

Instead of addressing those relevant matters, Petitioner attempts to divert attention away from the established standard for judicial review of the Board's decision with arguments that do not warrant serious consideration. The Court begins by rejecting Petitioner's claim that the 2011 amendments to Executive Law § 259–c(4)("the 2011 Amendments") have not been implemented. The 2011 Amendments do not require the promulgation of formal rules and regulations regarding the procedures to be utilized in making parole release determinations and thus the failure to file the requisite "written procedures" does not render the parole decision in violation of lawful procedure, arbitrary or capricious (Matter of Montane v Evans, _ AD3d _, 2014 WL 958465, [3d Dept 2014]). The Board must still conduct a case-by-case factual review of each inmate's application for release by consideration of the eight factors set forth in Executive Law § 259-i (2)(c)(A), but now such review must include an instrument that measures

rehabilitation and the likelihood of success on parole (see Executive Law §§ 259-c[4]; 259-i[2][c]). Indeed, the Legislature stressed that the 2011 amendments were not intended to interfere with the Board's "fundamental authority to make release decisions based on the [B]oard members' independent judgment and application of statutory criteria" (L 2011, ch 62, § 1, part C, subpart A, § 1)(Matter of Montane v Evans, _ AD3d _, 2014 WL 958465, [3d Dept 2014]). Furthermore, the October 2011 memorandum sufficiently establishes the requisite procedures for "incorporat[ing] risks and needs principles" into the process of making parole release decisions (see Executive Law § 259-c [4]) and satisfied the Board's obligations under the 2011 Amendments (Matter of Montane v Evans, _ AD3d _, 2014 WL 958465, [3d Dept 2014]).

Petitioner has failed to demonstrate that the information that the Board relied on was inaccurate. For example, Petitioner urges that he did not shoot his victim down in coldblood but fatally shot the victim in the abdomen because the victim apparently did not believe that the pistol Petitioner had pointed at him was real and the victim came toward Petitioner. Petitioner disputes the evidence that multiple shots were fired, but has presented no evidence to support his claim that only one shot was fired. Petitioner has presented no evidence to support his version of the crime. The Court notes that the hearing transcript demonstrates that Petitioner corrected the Board regarding those other matters of little consequence that Petitioner considered inaccurate. The Court finds that any discrepancy over whether Petitioner's victim was 60 years old or 58 years old does not support reversing the determination. The Court rejects Petitioner's claim that the Board erred in concluding that shooting his victim in the abdomen from three feet away was consistent with having an intent to kill his victim.

The Court rejects Petitioner's claim that the Board had predetermined not to release him to parole supervision. Petitioner has presented no evidence to support his accusation. Petitioner's arguments for inferring such misconduct are both insufficient and unpersuasive. A presumption of regular and honest motivation attaches to official acts and renders them impervious to attacks such as Petitioner's that consist of conclusory assertions unsupported by factual allegations (Matter of Altamore v Barrios-Paoli, 90 NY2d 378, 386 [1997]; Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept., of Environmental Conservation, 23 AD3d 811, 813-814 [3d Dept 2005]). In the absence of a convincing demonstration to the contrary, the Court presumes that Respondent acted properly and in accordance with statutory requirements (Matter of Putland v Herbert, 231 AD2d 893 [4th Dept 1996]; Matter of McClain v New York State Div. of Parole, 204 AD2d 456, 456 [2d Dept 1994]).

Accordingly, Petitioner's petition is denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall 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.

So Ordered.

Dated: Albany, New York
April / , 2014

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated October 21, 2013; Petition dated September 24, 2013, with attached exhibits.
2. Answer dated January 31, 2014; Affirmation of Steven M. Kerwin, AAG dated January 31, 2013, with attached exhibits A-S; Affirmation of Terrence X. Tracy, Esq. dated December 18, 2013, with attached exhibits A-E.
3. Affidavit of Frank Banks dated February 6, 2014.