Matter of Dowling v Stanford
2015 NY Slip Op 30956(U)
May 15, 2015
Supreme Court, St. Lawrence County
Docket Number: 144670
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
VINCENT DOWLING,#92-A-6902,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole,
Respondent.

DECISION AND JUDGMENT
RJI #44-1-2014-0797.34
INDEX #144670
ORI # NY044015J

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Vincent Dowling, verified on November 13, 2014 and filed in the St. Lawrence County Clerk's office on November 19, 2014. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the February 2014 determination denying him discretionary parole release. The Court issued an Order to Show Cause on November 24, 2014 and has received and reviewed respondent's Answer and Return, including confidential Exhibits B, C and I, verified on February 6, 2015. The Court has also received and reviewed petitioner's Reply Affidavit, sworn to on February 17, 2015 and filed in the St. Lawrence County Clerk's office on February 20, 2015.

On July 7, 1992 petitioner was sentenced in Nassau County Court to a controlling indeterminate sentence of 15 years to life upon his convictions, following pleas, of the crimes of Murder 2° and Intimidating of Witness 3°. The judgment of conviction was affirmed on direct appeal to the Appellate Division, Second Department. *People v. Dowling*, 209 AD2d 634, *lv denied* 85 NY2d 937.

After having been denied discretionary parole release on four prior occasions petitioner made his fifth appearance before a Parole Board on February 12, 2014. Following that appearance a decision was rendered again denying him discretionary parole release and directing he be held for an additional 24 months. The parole denial determination reads as follows:

> "AFTER CAREFULLY REVIEWING YOUR RECORD, A PERSONAL INTERVIEW AND DUE DELIBERATION, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED AS THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND FURTHERMORE, YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY. YOU STAND CONVICTED OF THE SERIOUS OFFENSE OF MURDER AND INTIMIDATION INVOLVING THE BEATING, STOMPING, STANGLING [sic, presumably meant to be STRANGLING] AND SUFFOCATION OF THE VICTIM CAUSING HER DEATH. THE PANEL MAKES NOTE OF ALL STATUTORY FACTORS INCLUDING YOUR REHABILITATIVE EFFORTS AND PROGRAMING, RISK AND NEEDS ASSESSMENT, REEENTRY [sic] PLANS, LETTERS OF SUPPORT, SENTENCING MINUTES, AND YOUR IMPROVED DISCIPLINARY RECORD. THE BOARD NOTES THAT YOUR LAST TIER 3 TICKET OCCURRED IN 2011 AND INVOLVED DRUG USE. THE BOARD NOTES YOUR ACCOMPLISHMENT AND URGES YOU TO CONTINUE TO WORK ON YOUR ISSUES AND TO REMAIN DRUG FREE. A DRUG TICKET ALTHOUGH ALMOST 3 YEARS AGO IS OF CONCERN TO THE BOARD AS YOUR CRIME INVOLVED DRUG USE. AT THIS TIME, THE PANEL HAS DETERMINED AFTER WEIGHING ALL REQUIRED FACTORS, YOUR DISCRETIONARY RELEASE IS DENIED."

The document perfecting petitioner's administrative appeal from the February 2014 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on July 23, 2014. The Appeals Unit, however, failed to issue its findings and recommendation within the four month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "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 the 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 . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (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 presentence 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 . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

A significant portion of the petition is focused on the assertion that the parole denial determination was improperly based primarily on the nature of the crimes

underlying petitioner's incarceration, as well as his prison disciplinary record, without adequate consideration of other relevant statutory factors. A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the DOCCS Parole Board Report (February 2014 Reappearance Report) and transcript of petitioner's February 12, 2014 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's prior criminal record, therapeutic/vocational programing records, educational achievements, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crimes underlying petitioner's incarceration and his prison disciplinary record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

In view of the above, the Court finds no basis to conclude that the Parole Board

failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration as well as his improved, but still troubling, prison disciplinary record. *See Olmosperez v. Evans*, 114 AD3d 1077, *Shark v. New York State Division of Parole Chair*, 110 AD3d 1134, and *Veras v. New York State Division of Parole*, 56 AD3d 878.

Specifically with respect to petitioner's prison disciplinary record, the Court notes that in the almost 19 years from the time he was received into DOCCS custody in August of 1992 until July of 2011, petitioner incurred 12 Tier III and 19 Tier II disciplinary violations. Although the Parole Board noted that petitioner had maintained a clean disciplinary record for approximately 31 months immediately preceding his February 12, 2014 reappearance interview, it also noted that his most recent disciplinary violation (July of 2011) was a Tier III violation for drug use. Notwithstanding the foregoing, petitioner's August 2013 completion of the DOCCS ASAT (Alcohol and Substance Abuse Treatment) program was discussed during the reappearance interview. Nevertheless, in view of the fact that petitioner's underlying crimes of incarceration were committed at a time he was admittedly abusing drugs and alcohol, the Board's concern with respect to the July 2011 infraction is not irrational. Petitioner's clean disciplinary record during the 31 months immediately proceeding his February 12, 2014 reappearance interview might rationally be viewed as a more compelling factor if it had spanned a substantially broader portion of the 21½ years petitioner's spent incarcerated prior to that interview.

Petitioner also argues, in effect, that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing a new violent felony offense, for rearrest and/or for absconding. This Court notes, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the nature of the underlying crime and his prison disciplinary record. *See Rivera v. New York State Division of*

Parole, 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Petitioner also argues that his Parole Board " . . . failed to offer any detailed reason or fact based rationale for its conclusory statement that 'release would deprecate the seriousness of the offense and undermine respect for the Law.' Such a critical failure is fatal to the decision." (Citations omitted). The Court notes, however, that petitioner's Board never reached the conclusion purportedly quoted above. In any event, the Court finds that the February 2014 parole denial determination was sufficiently detailed to inform petitioner of the reason(s) underlying the denial and to facilitate judicial review thereof. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295 and *Ek v. Travis*, 20 AD3d 667, *app dismissed* 5 NY3d 862. Finally, the Court finds no merit to petitioner's assertion that the February 2014 parole denial determination stemmed from an unspecified executive policy dating back to the administration of Governor Pataki. *See Cartagena v. Alexander*, 64 AD3d 841 and *Lue-Shing v. Pataki,* 301 AD2d 827, *lv denied* 99 NY2d 511.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: May 15, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court