Matter of Menard v New York State Bd. of Parole
2019 NY Slip Op 30592(U)
March 11, 2019
Supreme Court, New York County
Docket Number: 159376/17
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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In the Matter of ELIZABETH MENARD,

Petitioner,

Index No.: 159376/17

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

DECISION/ORDER

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Elizabeth Menard ("Menard" or "Petitioner") brings this Article 78 proceeding seeking an order vacating the January 10, 2017 decision of respondent New York State Board of Parole (the "Board"), denying her release on parole, and ordering a new hearing.

BACKGROUND FACTS

Menard, 51 years old at the time the Petition was filed, is serving an indeterminate sentence of twenty years to life for second-degree murder and first-degree burglary and is an inmate at the Taconic Correctional Facility. On May 22, 1989, Menard, at the time twenty-three years old, entered the home of the victim with her co-defendant and stabbed the victim at least forty times (Verified Answer, Exhibit "A" [Board Report]; *see also* Petition, Exhibit "K" at 10 [tr Board hearing, January 10, 2017]*)*. Menard admits that she was under the influence of drugs and alcohol on the night she committed the crime (*Id.* at 6).

Menard appeared before the Board for the fifth time on January 10, 2017. In or about

May 2017, Menard filed an administrative appeal of the Board's adverse determination. On June 21, 2017, the Board denied Menard's administrative appeal.[1] It is undisputed that Menard has exhausted her administrative remedies.

Menard argues that the Board: (a) failed to adequately consider the factors pertaining to parole set forth in Executive Law § 259-i (2) (c) (A); (b) acted unlawfully in violation of Executive Law § 259-i (2) (c) and 9 NYCRR 800.2,[2] when it focused solely on the seriousness of Menard's crime; (c) unlawfully considered non-statutory criteria; and (d) failed to provide a detailed, non-conclusory written decision.

DISCUSSION

"In an Article 78 petition challenging a parole decision, the petitioner bears the burden to show that the decision is the result of irrationality bordering on impropriety, and is thus arbitrary and capricious" (*Matter of Rossakis v New York State Bd. of Parole*, 146 AD3d 22, 26 [1st Dept 2016] [internal quotation marks and citations omitted]). The granting, or refusal, of parole is governed by Executive Law § 259-i. "[I]t is well established that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements of Executive Law § 259-i" (*Matter of King v Stanford*, 137 AD3d 1396, 1397 [3d Dept 2016]).

The Board is required to consider the following factors, among others not relevant here:

"(i) the institutional record, including program goals and accomplishments,

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[1]Menard appeared before the Board in 2009, 2011, 2013 and 2015 and was denied release (Verified Petition at 3).

[2]Changes to the regulations that strengthened the Board's mandate to focus on an applicant's rehabilitation were adopted after Menard's Board hearing.

> 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 . . . (iv) any deportation order issued by the federal government . . . (v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased . . . (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 . . . (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)).

"It is not necessary that the Board's decision specifically refer to each and every one of these factors, or that the Board give each of them equal weight. However, while the courts remain reluctant to second guess the decisions of the Board, it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the courts must intervene" (*Matter of King v New York State Div. of Parole*, 190 AD2d 423, 431 [1st Dept 1993] [internal citations omitted], *aff'd* 83 NY2d 788 [1994]; *see Matter of Rossakis v New York State Bd. of Parole*, 146 AD3d at 27]). The Board may "place greater emphasis on the serious nature of the crimes" for which the prisoner has been sentenced (*Matter of King v Stanford,* 137 AD3d 1396, 1397 [3d Dept 2016]; *see also Matter of Mullins v New York State Bd. of Parole,* 136 AD3d 1141, 1142 [3d Dept 2016]). However, the Board "may not deny parole based solely on the seriousness of the offense" (*Matter of Rossakis v New York State Bd. of Parole*, 146 AD3d at 27 citing *Matter of Ramirez v Evans*, 118 AD3d 707 [2d Dept 2014] and *Matter of Gelsomino v New York State Bd. of Parole,* 82 AD3d 1097 [2d Dept 2011]).

Moreover, pursuant to the 2011 amendments to Executive Law § 259-c (4), the statutory criteria in section 259-i (2) (c) (A) "must be considered in light of the statute's strong rehabilitative component" (*Matter of Montane v Evans*, 116 AD3d 197, 203 [3d Dept 2014] [internal quotation marks omitted]).[3]

Here, the Board's denial, dated January 10, 2017, consists of a brief one page decision which provides:

> "This panel has concluded that your release to supervision is not compatible with the welfare of society and therefore parole is denied.
> This finding is made following a personal interview, record review and deliberation.
> Of significant concern is your record of alcohol abuse that includes [*sic*] prior to your instant offense of murder 2nd and burglary 1st. Your compas score[e][4] is "probable" for re-entry substance abuse. Positive factors considered include your case plan, programming, letters of support and immigration status.
> In addition, we have considered comments made by the district attorney's office and community opposition - if any.
> Your behavior has improved since 2008. Your instant offense represents escalation from prior Florida misdemeanors you described. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your need[ ] for successful community reintegration. To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law" (Verified Petition, Exhibit "A").

The Board failed to explain its denial in non-conclusory terms. The Board's statements that Petitioner's release "is not compatible with the welfare of society" and that release would "deprecate the seriousness of [Petitioner's] offense so as to undermine respect for the law" come

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[3]Executive Law § 259-c (4) provides that the Board shall "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision."

[4]COMPAS denotes the 'Correctional Offender Management Profiling for Alternative Sanction' (*see Matter of Ramirez v Evans*, 118 AD3d 707, 708 [2d Dept 2014]).

directly from the introductory language of Executive Law § 259-i (2) (c) (A) with no analysis. "Although the Board is not required to give all statutory factors equal weight or to articulate each factor considered in making its decision, it must present some statutory rationale for its decision" (*Matter of Vaello v Parole Bd. Div. of State of N.Y.*, 48 AD3d 1018, 1019 [3d Dept 2008]; *see Matter of Matter of Rossakis v New York State Bd. of Parole*, 146 AD3d at 27]).

In the instant matter, the Board decision failed to adequately consider the statutory factors. The decision merely states in a perfunctory fashion that "statutory factors have been considered including Petitioner's "risk to the community, rehabilitation efforts, and [Petitioner's] need[ ] for successful community reintegration" without articulating any explanation for how these factors were applied. As such, the Board decision failed to set forth a fair consideration of the statutory factors (*see Matter of King v New York State Div. of Parole*, 190 AD2d 423 at 431).

In particular here, the Board failed to discuss various factors such as Petitioner's overall low COMPAS score, her rehabilitative efforts, her community engagement and leadership, positive institutional record, her remorse, her release plans and deportation order. Menard's parole packet consisted of, among other submissions, a personal statement expressing her remorse and detailed action plan upon release, her deportation order, letters of support from correctional officers, family, friends, educators and staff, resume and certificates and awards (Verified Petition, Exhibit "G"). While incarcerated, Menard earned her GED High School Certificate, gained vocational skills with numerous courses in horticulture, cooking and food preparation, attended substance abuse and alternatives to violence programming including as a facilitator for the Alternatives to Violence Project (*see* Verified Petition, Exhibit "I"). Furthermore, Menard presented a letter describing a food service job which will be offered to

Menard after she is deported to Haiti.

The transcript of the hearing also reflected that the Board focused heavily on the underlying offense and its surrounding circumstances without giving sufficient consideration to the other statutory factors. The Board asked four questions about her deportation order (two of which questioned her knowledge about the penalty for illegal reentry), one question about her last misbehavior report from 2008, one question whether Menard had a "temper or something" during her early years of incarceration, four questions about her relationship with her cousin prompted by a letter of support her cousin provided, one question about her mother's current residence, two questions about Menard's education, two questions about Menard's participation in one program and one acknowledgment of her current assignment as "industries worker" (Verified Petition, Exhibit "K" [tr Board hearing] at 2, 3, 7, 10, 11, 12). In contrast, the majority of the Board's questions pertain to the seriousness of Menard's crime and her prior criminal history.[5] Significantly, "[t]he role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, [s]he should be released" (*Matter of King v New York State Div. of Parole*, 190 AD2d at 432).

Furthermore, the Board Decision states that Menard's COMPAS score is "probable" for reentry substance abuse without discussion of the underlying COMPAS Risk Assessment Report stating that Menard 'may' have a substance abuse problem and that substance abuse treatment intervention or aftercare program after release may be warranted (Verified Petition, Exhibit "H"

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[5]Menard's prior criminal history consisted of non-violent misdemeanors for which she spent one week in jail (Verified Petition, Exhibit "K" [tr Board hearing] at 4-5).

at B-077).[6] The Board failed to discuss her lower COMPAS scores in every other category, such as risk of felony violence and arrest and that the scores reflect that she has a low risk for re-offending, and is unlikely to need vocational or educational intervention (*see* Exhibit "H").

Executive Law § 259-i (2) (a) provides that "reasons [for denying parole] shall be given in detail and not in conclusory terms." The Board focused on the seriousness of Menard's crime "without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent criminal history" (*Matter of Matter of Rossakis v New York State Bd. of Parole*, 146 AD3d at 27). As such, the Board acted with an irrationality bordering on impropriety in denying Menard parole. Neither the Board's determination nor the hearing transcript reflects that the Board reviewed and considered, other than in a conclusory fashion, the statutory factors set forth in Executive Law § 259-i (2) (c) (A).

Petitioner is entitled to a new parole hearing before Commissioners who have not sat on any of Petitioner's earlier parole hearings (*see id* at 29; *Matter of Quartararo v New York State Div. of Parole*, 224 AD2d 266, 266 [1st Dept 1996]; *Matter of King v New York State Div. of Parole*, 190 AD2d at 435).

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent that the January 10, 2017 decision of respondent New York State Board of Parole denying parole to Petitioner

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[6]The COMPAS score of "3" for reentry substance abuse is still considered "low" (*see Matter of Hawthorne v Stanford,* 135 AD3d 1036, 1040 [3d Dept 2016]).

Elizabeth Menard is vacated, and the matter is remanded to said Board for a rehearing before a different panel of commissioners.

Dated: March 11, 2019

ENTER:

J. S. C.

SHLOMO HAGLER
J.S.C.