

Matter of Foy v New York State Parole Bd.
2024 NY Slip Op 35417(U)
April 11, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2023-54709
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

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In the Matter of
KENNETH FOY,

Petitioner,

DECISION & ORDER

Index No. 2023-54709

-against-

NEW YORK STATE PAROLE BOARD,

Respondent.
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ACKER, J.S.C.

The Court considered NYSCEF Doc. #s 1-26¹ on the application of Petitioner Kenneth Foy (“Petitioner”) pursuant to CPLR Article 78 seeking an Order vacating the April 11, 2023 Decision of Respondent New York State Parole Board (“Parole Board”) which denied his release. Petitioner further seeks an “immediate” *de novo* interview before Commissioners that did not sit on the April 2023 Board.

Petitioner is currently incarcerated at Sullivan Correctional Facility based upon his guilty plea on two separate offenses, to wit: (1) Attempted Murder in the Second Degree, Assault in the First Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree, for which he received a determinate sentence of 23 years and (2) Attempted Murder in the First Degree, for which he received a sentence of 15 year to life, to run concurrently with Petitioner’s earlier sentence.

¹ The Court also reviewed, *in camera*, the confidential documents submitted by Respondent as Exhibit 2 (entire exhibit) and portions of Exhibits 3 and 10.

On December 12, 2001, Petitioner approached Latisha Singletary, a 25 year old woman with two young children, whom he knew from working in the same building. When she refused to speak to him, Petitioner grabbed her and a struggle ensued. Petitioner fired a gun at the pavement to scare her, then the gun jammed and she broke free. Petitioner pursued her, they struggled and he shot Ms. Singletary in the leg. When she fell to the ground, Petitioner fired three more times, striking her in the head and neck, before fleeing the scene. While Ms. Singletary survived, she was left paralyzed from the neck down.

Petitioner fled to Brooklyn, to the apartment of the woman who is now his wife. On December 13, 2001, there was a knock on the door and when Petitioner's friend said it was the police, he told her to open the door. When she did, the police entered and Petitioner opened fire. One of Petitioner's rounds struck an officer on his Kevlar helmet, causing a non-fatal injury. Petitioner was also wounded before being disarmed and taken into custody.

The instant application was brought as a result of the Parole Board's April 11, 2023 parole release denial and imposition of an additional 24 month hold. Petitioner timely filed an administrative appeal and the parole denial was affirmed on November 14, 2023. This was Petitioner's second appearance before the Parole Board and, at the time of the interview, he had served approximately 21 years.

Petitioner maintains that the Board's Decision should be vacated and a *de novo* interview be ordered for the following reasons: (1) the Board based its decision solely on the circumstances the underlying crimes; (2) the Board failed to state whether it was departing from Petitioner's low COMPAS scores, although some language in the Decision indicated that there had been a departure; and (3) the Decision failed to provide detailed reasons for the denial and the denial was not supported by the record.

Legal Standard

Pursuant to New York Executive Law §259-i(2)(c)(A), “[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined.” Instead, the Parole Board must consider “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.” *Id.*

That section further requires the Parole Board to consider, *inter alia*, the following in making a parole decision: (1) the incarcerated individual’s institutional record; (2) release plans; (3) 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 incarcerated individual, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors; and (4) prior criminal record.

“If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.” Executive Law §259-i(2)(a).

It is well settled that judicial review of a determination of the Parole Board is narrowly circumscribed. *Matter of Campbell v. Stanford*, 173 AD3d 1012, 1015 [2d Dept. 2019], *leave to appeal dismissed*, 35 NY3d 963 [2020]. A Parole Board determination to deny early release may only be set aside where it evinces “irrationality bordering on impropriety.” *Id.* Although the Parole Board is required to consider the relevant statutory factors as identified in Executive Law §259-i(2)(c)(A), it is not required to address each factor in its decision or accord all the factors equal weight. *Id.* “Whether the Parole Board considered the proper factors and followed the

proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript.” *Id.*

Petitioner’s April 11, 2023 Interview and Respondents’ Decision

The transcript of Petitioner’s parole interview is annexed to the Petition as Exhibit A and to the Answer and Return as Exhibit 4 (hereinafter referred to as “Interview Transcript”). The Board’s Decision denying parole is contained at pages 20-22 of the Interview Transcript (hereinafter referred to as “Decision”).²

The Decision begins with a recitation of the nature and circumstances of Petitioner’s offenses. It notes that Petitioner shot the female victim multiple times and that, as a result of the shooting, she suffered serious injuries and was left permanently paralyzed from her neck down. The Decision further details the police’s attempt to apprehend Petitioner the next day and that, instead of surrendering, Petitioner fired several shots at police, one of which struck a police sergeant in the helmet protecting his head.

The Board discusses the reasons Petitioner gave for his actions, which include his fear and paranoia as a result of 9/11. Petitioner told the Board that he was angry when the female victim refused to speak to him and he shot her because of his anger. Petitioner then left Ms. Singletary on the ground and did not seek medical attention for her. The Board recognizes that Petitioner expressed remorse for his violent actions and he also stated that he had learned to control his anger and seek mental health support.

The Decision reviews various considerations it discussed with Petitioner during the interview, including Petitioner’s case plan and parole packet, his letters of support and the apology letters Petitioner had written, as well as the fact that this was Petitioner’s first term of

² Respondent also provides as Exhibit 5 a separate “Parole Board Release Decision Notice” that contains virtually the same content as the transcript but is dated May 1, 2023.

incarceration. The Board acknowledges Petitioner's efforts toward rehabilitation, which include completion of multiple trainings and participation in a college program. According to the Decision, the Board discussed Petitioner's efforts to change and grow from the person who committed his crimes, and that Petitioner's last disciplinary report was received in 2010.

Despite Petitioner's personal growth and productive use of his time, the Board emphasizes that discretionary release should not be granted merely as a reward for good conduct. While the Board had weighed and considered Petitioner's COMPAS risk assessment, which reflects low scores, they find the "aggravating factors" of the instant offense to be more compelling. Specifically, that Petitioner had committed multiple acts of violence, including shooting the female victim multiple times and leaving her paralyzed and then engaging in a shootout with police. The Decision notes that the pre-sentencing report and the sentencing minutes "reveal the pain and suffering you caused your female victim and the impact of your senseless and violent acts." The Parole Board finds Petitioner's actions to be extremely heinous, demonstrating not only a total disregard for the law, but also for human life. It concludes that

despite your low risk and needs scores, after reviewing your overall record and weighing all factors, discretionary release is not warranted at this time as your release is incompatible with the welfare of society as it would trivialize the harm you have caused your victims, who will forever be impacted by your actions. As such, your release would so deprecate the serious nature of your crime so as to undermine respect for the law.

Legal Analysis

In the instant matter, while Petitioner identifies three grounds upon which he challenges the Parole Board's denial, his primary argument is that the Board's decision was improper because it was entirely based upon the instant offenses.

It is well settled that the "Parole Board is not required to give equal weight to each factor, nor is it required to articulate specifically each factor in its determination." *Matter of Huntley v.*

Evans, 77 AD3d 945, 947 [2d Dept. 2010]. Nevertheless, “where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.”

This Court is mindful that its review of the Parole Board’s Decision is “narrowly circumscribed.” To that end, Appellate Court decisions inform that the critical focus is on whether the Board gave “genuine” or “fair” consideration to the statutory factors in reaching its determination. *See e.g. Matter of Ferrante v. Stanford*, 172 AD3d 31, 38 [2d Dept. 2019] and *Matter of Rossakis v. New York State Bd. of Parole*, 146 AD3d 22, 27 [1st Dept. 2016], *quoting Matter of King v. New York State Div. of Parole*, 190 AD2d 423, 431 [1st Dept. 1993], *aff’d*, 83 NY2d 788 [1994]. While Petitioner’s counsel cites to numerous cases in which trial level courts vacated parole board denials for relying solely on the seriousness of the petitioner’s offenses (including a number of this Court’s), every case must be evaluated based upon its own specific facts. In other words, this Court must determine whether this Parole Board adhered to the guidelines and considered the proper factors “based upon the written determination evaluated in the context of the parole interview transcript.” *Matter of Campbell, supra*.

To that end, the Decision and Interview Transcript reflect that the Board gave genuine consideration to all relevant statutory factors, including the seriousness of Petitioner’s offenses, his lack of a criminal history and relatively clean disciplinary history, positive program accomplishments, his release plans, the sentencing minutes, pre-sentence report and the COMPAS Risk and Needs Assessment instrument. *See Matter of Copeland v. New York State Bd. of Parole*, 154 AD3d 1157, 1158 [3d Dept. 2017].

Petitioner maintains that the Board improperly based its decision upon the seriousness of Petitioner’s crimes and the resultant harm. Of note, these can be two separate considerations. In

addition to the seriousness of the offenses, the Parole Board is also required to consider “any mitigating and aggravating factors.” *See* §259-i(2)(c)(A)(vii); *see also Matter of Huntley, supra*. Here, the Parole Board found such aggravating factors in Petitioner’s multiples acts of violence, to wit: shooting Ms. Singletary, a young mother, three times, paralyzing her, and then engaging in a shootout with the police while they attempted to apprehend him. These “aggravating factors” also include the resultant harm that Petitioner’s actions caused the victims. Petitioner’s counsel argues that this is a case where “no one was killed” and while this was still “extremely serious, it cannot be considered more serious, or with greater harmful impact, than the many murder cases where parole release was granted.” The Court disagrees.

While Ms. Singletary survived, she was left a quadriplegic and is wheelchair bound. The transcript reflects that, according to the presentence investigation report, she was depressed, suffers from daily trauma and financial repercussions from her injuries. The Parole Board properly considered both the effect that Petitioner’s actions have had upon the quality of her life, as well as the “harmful impact” that his potential release would have on her.³ Contrary to counsel’s assertion, compared to the family of a deceased victim, it is likely that the harm that Petitioner caused Ms. Singletary and the specter of his release would be even more impactful to her as a survivor.⁴

The instant matter is distinguishable from other cases in which courts found that parole was denied solely on the seriousness of the offenses. In *Matter of Gelsomino v. New York State Bd. of Parole*, 82 AD3d 1097 [2d Dept. 2011], the Second Department found that “in denying

³ The Court is cognizant that the police sergeant who was shot in his helmet is also a victim to be considered in this evaluation, however, the record does not similarly detail his injuries or the manner in which his life was affected.

⁴ In fact, this issue was specifically addressed with Petitioner during his interview. The Parole Board asked Petitioner how he thought Ms. Singletary would feel if he were to be released. Petitioner responded “[p]robably angry. Only God can tell what her heart says but probably angry and I understand that. I still pray for her and her children because I know I caused her to be paralyzed.”

the petitioner's application for release on parole, the Parole Board cited only the circumstances of the underlying crimes and failed to mention any of the other statutory factors, including his excellent disciplinary record, his record of achievements while incarcerated, as well as positive statements made by the sentencing court.” In *Matter of Huntley, supra*, the Second Department found that the Parole Board's determination demonstrated that it failed to weigh the statutory factors, because it cited only the seriousness of the petitioner's crime, and failed to mention any of the other statutory factors in its determination. *See also Matter of Mitchell v. New York State Div. of Parole*, 58 AD3d 742, 743 [2d Dept. 2009] (“While the seriousness of the underlying offense remains acutely relevant in determining whether the petitioner should be released on parole, the record supports the petitioner's contention that the Parole Board failed to take other relevant statutory factors into account”); *Matter of Ferrante, supra* (the Board denied parole release exclusively on the basis of the underlying conviction without having given genuine consideration to the statutory factors).

Unlike these cases, the Parole Board here weighed and balanced all of the statutory factors and “took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole. The Parole Board was not required to give each factor equal weight and was entitled to place greater emphasis on the severity of the petitioner's crimes.” *Matter of Campbell, supra* at 1016; *see also Matter of Applegate v. New York State Bd. of Parole*, 164 AD3d 996, 997 [3d Dept. 2018] (Board “considered all of the relevant factors and was free to place emphasis on the brutal nature of the crime and was not required to give equal weight to each statutory factor in denying petitioner's request”); *Mills v. New York State Bd. of Parole*, 224 AD3d 1025, 1029 [3d Dept. 2024].

Ultimately, after consideration of the statutory factors, “the Board was free to place particular emphasis, as it did, on the extremely violent nature of the crime and petitioner’s uncontrollable anger during the commission thereof.” *Matter of Schendel v. Stanford*, 185 AD3d 1365, 1366 [3d Dept. 2020].

COMPAS

Petitioner also argues that the Parole Board’s determination should be vacated because the Board failed to state whether or not it was departing from his “completely low” COMPAS scores. Pursuant to 9 N.Y.C.R.R. §8002.2(a),

[i]n making a release determination, the Board shall be guided by risk and needs principles, including the inmate’s risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, “Department Risk and Needs Assessment”). If a Board determination, denying release, departs from the Department Risk and Needs Assessment’s scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. [Emphasis supplied].

Petitioner concedes that the Board does not state that it was departing from his low COMPAS scores. Instead, Petitioner maintains that given his low scores, the Board’s conclusion that his release would be incompatible with welfare of society is itself a COMPAS departure.

There is no requirement in 9 NYCRR §8002.2(a) that a Board, in denying parole, must explain each COMPAS category where a petitioner receives a low score. Otherwise, every board that denies parole would have to provide an individualized reason for every low COMPAS score. The plain language of the regulation only requires an explanation when there is a departure from a scale. In the instant matter, the Decision does not state that the Board departed from a specific COMPAS score or even that it disagreed with said scores. Indeed, the Board stated that it weighed and considered his low scores. However, such low scores do not guarantee a specific

result. These scores are but one of the statutory factors for the Parole Board to consider, and the record is clear that it did so.

Petitioner's remaining arguments are similarly unavailing. Petitioner asserts that the Parole Board failed to provide detailed reasons for its denial and "simply and improperly denied release based on the nature of the offense, including the harm caused to the victims." As discussed above, the Board's Decision is substantive and detailed, and gave genuine consideration to the required statutory factors. When evaluated in conjunction with the Interview Transcript, the Board's reasoning for its denial is clear. Despite the positive accomplishments contained in the record and painstakingly listed in the Petition, "[d]iscretionary release may not be solely granted as a reward for exemplary conduct." *Matter of Campbell, supra*.

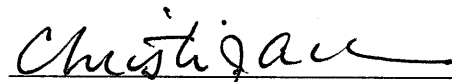
Finally, Petitioner maintains that there is "nothing" in the record indicating that Petitioner's release would be incompatible with the welfare of society or that his release would deprecate the seriousness of the offense and that the Board's "conclusory claims. . . were meaningless boilerplate with no support in the record." However, the Parole Board's determination to deny parole release may be set aside only where it evinces "irrationality bordering on impropriety"⁵ and Petitioner fails to meet this standard. While Petitioner may disagree with the Board's conclusion that his release would "trivialize the harm you have caused your victims, who will forever be impacted by your actions," this statement is supported by the Interview Transcript and the preceding analysis in which the Board weighed the aggravating circumstances of Petitioner's crimes and the continuing harm to the victims.

⁵ *Matter of Ferrante, supra* at 37, quoting *Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77 [1980].

In sum, Petitioner failed to sustain his burden of demonstrating that the Parole Board's determination was irrational and the Petition is denied and the proceeding dismissed. *Matter of Campbell, supra.*

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 11, 2024


CHRISTI J. ACKER, J.S.C.

To: All Counsel *via* NYSCEF