Matter of Heid v New York State Bd. of Parole
2012 NY Slip Op 31694(U)
June 12, 2012
Sup Ct, Albany County
Docket Number: 7332-11
Judge: George B. Ceresia Jr
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of FRANK HEID,

Petitioner,

-against-

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 # 01-12-ST3269 Index No. 7332-11

Appearances: Frank Heid
Inmate No. 86-B-2239
Petitioner, Pro Se
Cayuga Correctional Facility
PO Box 1186
Moravia, New York 13118-1186

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Cayuga Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated January 25, 2011 to deny petitioner discretionary release on parole. Petitioner is serving a controlling term of

19 years to life upon a conviction of murder in the second degree. The petitioner attributes his crime, committed when he was age 20, to being "extremely intoxicated, under the influence of a variety of drugs, suffer[ing] from cognitive deficits and low self-esteem as a result of a dysfunctional childhood." He points out that he received a General Equivalency Diploma on August 17, 1987, an Associates of Science Degree from Ulster Community College in May 1992, and a Bachelor's of Arts Degree from S.U.N.Y. New Paltz. He has applied for entry into the Masters Degree Program at Syracuse University. Other accomplishments include being certified as an Inmate Program Assistant. His prison employment has included maintenance stores clerk, carpenter, plumber MP-2 computer operator, snow plow operator, general mechanic and dorm porter. He is a Peer Counselor with the Office of Transitional Services. The petitioner has completed a number of programs, including Aggression Replacement Training, Non-violent Conflict Resolution, Alcohol and Substance Abuse, Sex Offender Program. He indicates that he has worked closely with family members and others to prepare for his re-entry into society.

The petitioner criticizes the Parole Board for failing to consider his educational, programing and employment accomplishments while incarcerated. He points out that this was his fourth appearance before the Parole Board. A major argument advanced by the petitioner is that the Parole Board failed to review his case pursuant to the 2011 amendments to Executive Law §§ 259-i and 259-c. He maintains that the Parole Board determination was not based upon a thorough evaluation of the statutory criteria, and was made in violation of Executive Law § 259-i (2) (c) (A). He faults the Parole Board for not instructing him of how he could qualify for release in the future.

The petitioner points out that the Parole Board received no statement from any party opposing his release. In his view the Parole Board placed unjustifiable reliance upon the severity of petitioner's crime, to the exclusion of all other factors; and contends that it violated a presumption in favor of release for parole reappearances. The petitioner also maintains that the twenty-four month hold was excessive and irrational.

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: 12/2012
>
> "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 the extremely violent and deviant nature of the instant offense of murder 2nd where you raped, mutilated and viciously stabbed an 85-year-old woman causing her death. Positive factors considered included your program accomplishments, community support and improved behavior since October 2006. In addition, your instant offense occurred after you had consumed drugs and alcohol. Your receipt of more than 2 dozen disciplinary violations including for drug actions is disturbing. To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law.
>
> "The probability you will live and remain at liberty without violating the law is not found to be reasonable given the factors noted above."

As relevant here, the 2011 legislation (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) amended the Executive Law, as it relates to parole determinations in two ways. First, Executive Law § 259-c was revised to abolish the old guideline criteria, and establish a review process that would place greater emphasis on assessing the degree to which inmates

have been rehabilitated, and the probability that they would be able to remain crime-free if released. Said section now recites: "[t]he state board of parole shall [] (4) 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" (L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, the latter amendment did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

With regard to the issue of retroactivity of the 2011 legislation, as noted, the parole determination here was made on January 25, 2011, well before the legislation was enacted, and well before the effective date of the amendment to Executive Law 259-c (4). Generally speaking, statutory amendments " are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated" (Matter of Gleason v Michael Vee Ltd., 96 NY2d 117, 122 [2001], citing People v Oliver, 1 NY2d 152, 157). While remedial legislation often will be applied retroactively to carry out its beneficial purpose, this is not the case where the Legislature "has made a specific

pronouncement about retroactive effect" (see Matter of Gleason v Michael Vee Ltd., supra, at 122). In this instance, as the Court observed in Matter of Hamilton v New York State Division of Parole (943 NYS2d 731, Platkin, Richard M.,Sup. Ct., Albany Co., 2012), "the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law § 259-c (4) should not be given effect with respect to administrative proceedings conducted prior to October 1, 2011." This Court agrees. Under such circumstances, there clearly was no Legislative intent that said amendments be applied retroactively to parole determinations rendered prior to October 1, 2011 (see id.).

While the appeals decision of the parole determination was rendered on November 3, 2011, the Court is of the view that inasmuch as the new procedures required under Executive Law § 259-c (4) did not exist as of the January 25, 2011 parole determination, the Appeals Unit did not err in reviewing the parole appeal under the administrative procedures which existed on that date. Phrased differently, the Appeals Unit could not rationally find that the Parole Board erred as a matter of law in not following an administrative procedure not yet adopted by the respondent, pursuant to legislation not yet enacted.

Turning now to the merits of the instant petition, 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]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). 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 the following matters: petitioner's educational accomplishments; letters written on his behalf; his support network of family and friends; his improved disciplinary record; and his plans upon release including residing with his Aunt, and anticipated future employment. 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 argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Matter of Francis v New York State Division of Parole, 89 AD3d 1312, 1313 [3d Dept., 2011]; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

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 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: June 12, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 12, 2011, Petition, Supporting Papers and Exhibits
2. Petitioner's Addendum dated January 12, 2012
3. Respondent's Answer dated February 10, 2012, Supporting Papers and Exhibits

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of FRANK HEID,

Petitioner,

-against-

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 # 01-12-ST3269 Index No. 7332-11 11

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 D, 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: June 13, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice