STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

FREDERICK GRIFFIN, 94-G-8252,

Petitioner,

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

-against-

ANDREA D. EVANS, CHAIRWOMAN OF
THE NEW YORK STATE DIVISION OF PAROLE,

Respondent.

DECISION and ORDER
INDEX NO. 1421-12
RJI NO. 01-12-ST3555

Supreme Court, Albany County All Purpose Term, June 1, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Frederick Griffin, 94-A-8252
Petitioner Pro Se
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TERESI, J.:

In November of 1994, after pleading guilty to Robbery in the First Degree (3 counts), Burglary in the First Degree (5 counts), Robbery in the Second Degree (2 counts), Assault in the

Second Degree (2 counts), Grand Larceny in the Fourth Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree, Petitioner was sentenced to an indeterminate term of 7 1/2 to 15 years in prison. While still in prison in April 2001, upon his plea of guilty to Attempted Promotion of Prison Contraband in the First Degree, Petitioner was sentenced to a consecutive indeterminate term of 1 3/4 to 3 1/2 years. Then, in April 2007 while still imprisoned, Petitioner was sentenced to a determinate term of 5 five years followed by five years of post release supervision upon his Assault in the Second Degree conviction.

Petitioner has now appeared before the NYS Board of Parole (hereinafter "Board") for a parole release interview. His parole was denied. Petitioner commenced this Article 78 proceeding to challenge such denial. The Board answered the petition and seeks its dismissal. Because Petitioner failed to demonstrate that the Board's determination was irrational bordering on impropriety, his petition is dismissed.

The Board's determinations "shall not be reviewable if done in accordance with law." (Executive Law §259-i[5]; Santos v Evans, 81 AD3d 1059 [3d Dept 2011]). "[P]rovided the Board's determination is made in accordance with statutory requirements (see Executive Law §259-i[2][c][A]), such determination will not be disturbed absent a showing of irrationality bordering on impropriety." (Romer v Dennison, 24 AD3d 866, 867-68 [3d Dept 2005], quoting Russo v New York State Board of Parole, 50 NY2d 69 [1980]; Francis v New York State Div. of Parole, 89 AD3d 1312 [3d Dept 2011]). "[I]n rendering its decision, the Board need not give every factor equal weight or articulate every factor it considered." (Matter of Murray v Evans, 83 AD3d 1320, 1321 [3d Dept 2011]). This Court's "role 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." (Comfort v New York State Div. Of Parole, 68 AD3d 1295, 1296 [3d Dept 2009]).

Here, Petitioner failed to demonstrate that the Board did not consider all of the statutory factors. Specifically, the record before the Board contained information regarding Petitioner's institutional programming, vocational education, release plans, letters of recommendation, the seriousness of the instant offense, disciplinary record and criminal history. Moreover, at the hearing the Board and Petitioner discussed the seriousness of the instant offense, his criminal history, disciplinary record and post-release plans. On such record, the Board sufficiently considered all of the statutorily relevant information. (Executive Law §259-i[5]). As the Board was not required to articulate every factor it considered or accord each factor equal weight, Petitioner failed to demonstrate that the Board's determination was irrational bordering on impropriety. (Morrison v Evans, 81 AD3d 1073 [3d Dept 2011]; Carter v Evans, 81 AD3d 1031 [3d Dept 2011]).

Contrary to Petitioner's claim, the Board was not required to consider Executive Law §259-c(4)'s recent amendment. (*see* L 2011, ch 62, part C, subpart A, § 38-b). The Board's denial of parole was rendered prior to the amendment's passage (March 31, 2011), precluding the Board's consideration of it. (L 2011, ch 62). As such, Petitioner seeks to apply the amendment retroactively. While remedial legislation is presumed to apply retroactively, "legislation setting forth a prospective effective date is sufficient to overcome any presumption of retroactivity." (People v Walker, 26 AD3d 676, 677 [3d Dept 2006][internal quotation marks omitted]). Here, the provision at issue was one of many amendments to the Executive Law that were enacted

simultaneously. (L 2011, ch 62). Unlike almost all of the other amendments, this one was not given immediate effect. (L2011, ch 62, part C, subpart A, §§49 and 49[f]). Instead, its "prospective effective date," six months after the effective date of the overall act, rebuts the presumption of retroactivity. (L2011, ch 62, part C, subpart A, §49[f]). Moreover, the act explicitly states that "[n]o existing right or remedy of any character shall be... affected by any provisions of this act." (L2011, ch 62, part C, subpart A, §45). These explicit provisions rebut the retroactivity presumption, and Petitioner failed to demonstrate that L 2011, ch 62, part C, subpart A, § 38-b should be given retroactive effect. (*see also* De Los Santos v Div. of Parole, __ AD3d __ n [3d Dept 2012]).

Similarly unavailing is Petitioner's claim that the Board's hold of 24 months was arbitrary and capricious, because it was well within the Board's discretion. (Murray v Evans, 83 AD3d 1320 [3d Dept 2011]; Matter of Tatta v State, 290 AD2d 907 [3d Dept 2002]). Nor does Petitioner proffer any proof that the Board's decision constituted a re-sentencing (Matter of Kalwasinski v Paterson, 80 AD3d 1065 [3d Dept 2011]), or that the Board's decision was predetermined. (Matter of Black v New York State Bd. of Parole, 54 AD3d 1076 [3d Dept 2008]).

Accordingly, the petition is dismissed.

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 §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
July 1, 2012

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated March 20, 2012; Verified Petition of Frederick Griffin, dated March 3, 2012, with attached Exhibit A.
2. Answer, dated May 24, 2012; Affirmation of Gregory J. Rodriguez, May 23, 2012, with attached Exhibits A-I.