STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
INJAH TAFARI, #89-A-4807,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0013.06
INDEX # 2012-20
ORI #NY016015J

-against-

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole,

Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Injah Tafari, verified on January 4, 2012 and filed in the Franklin County Clerk's office on January 12, 2012. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the May, 2011 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on January 19, 2012 and has received and reviewed respondent's Answer, including confidential Exhibits B and E, verified on March 10, 2012. The Court has also received and reviewed petitioner's Reply Memorandum of Law, dated March 12, 2012 and filed in the Franklin County Clerk's office on March 16, 2012. Finally, the Court has received and reviewed petitioner's Second Reply Memorandum of Law, dated May 2, 2012 and filed in the Franklin County Clerk's office on May 4, 2012.

On May 4, 1989 petitioner, under the name Richard Foust, was sentenced in Supreme Court, Kings County, as a persistent violent felony offender, to a controlling indeterminate sentence of 20 years to life upon his convictions of two counts of the crime

of Robbery 1°. In addition, on April 7, 2008 petitioner was convicted and sentenced in Ulster County Court, as a second felony offender, upon his conviction of the crimes of Assault 2° (two counts), Assault 3° and Criminal Mischief 3°. The 2008 convictions were reversed and a new trial ordered by the Appellate Division, Third Department. *People v. Tafari*, 68 AD3d 1540. On October 1, 2010, upon remittal, petitioner was sentenced in Ulster County Court, as a second felony offender, to a controlling determinate term of 4 years, with 5 years post-release supervision, upon his convictions of the crimes of Assault 2° (two counts) Assault 3° and Criminal Mischief 3°. Petitioner's 2010 sentences were directed to run consecutively with respect to the 1989 sentences he was then serving. It is noted that the criminal acts underlying petitioner's 2010 convictions were committed on December 7, 2005, while petitioner was an inmate in DOCCS custody.

On May 10, 2011 petitioner appeared before a two-member parole board for what was deemed an "initial" appearance.[1] Following that appearance a decision was rendered denying petitioner parole and directing that he be held for an additional twenty four months. Both parole commissioners concurred in the denial determination which reads as follows:

> "PAROLE IS DENIED. AFTER A CAREFUL REVIEW OF YOUR RECORD, YOUR PERSONAL INTERVIEW, AND DUE DELIBERATION, IT IS THE DETERMINATION OF THIS PANEL THAT, IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AT LIBERTY WITHOUT VIOLATING THE LAW. YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY AND WILL SO DEPRECATE THE SERIOUSNESS OF THIS CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THIS DECISION IS BASED UPON THE FOLLOWING FACTORS:

[1] Petitioner actually appeared before a Parole Board on two previous occasions (January of 2007 and February of 2010) prior to the 2010 Ulster County convictions/sentencings. After the imposition of those consecutive sentences, petitioner's release dates were recomputed and it was determined that his initial appearance on the merged sentences would be in May of 2011.

> YOU APPEARED BEFORE THIS PANEL WITH THE SERIOUS INSTANT OFFENSE OF ROBBERY, 1ST WHEREIN YOU IN CONCERT COMMITTED A GUNPOINT ROBBERY. YOU ARE ALSO CONVICTED OF ASSAULT, 2ND FOR THROWING A CHAIR THROUGH A WINDOW AND INJURING TWO C.O.'S.
>
> THESE CRIMES CULMINATE A LONG CRIMINAL HISTORY FILLED WITH ATTEMPT ROBBERY AND ATTEMPT BURGLARY.
>
> YOU HAVE A WELL ESTABLISHED PATTERN OF CRIMINAL BEHAVIOR. IN ADDITION, YOU HAVE A POOR RECORD OF ADJUSTMENT WHILE IN PRISON WHICH INCLUDES MULTIPLE TIER II INFRACTIONS AND MULTIPLE TIER III INFRACTIONS.
>
> CONSIDERATION HAS BEEN GIVEN TO ANY PROGRAM COMPLETION, HOWEVER, YOUR RELEASE AT THIS TIME IS DENIED."

The parole denial determination was affirmed on administrative appeal with the final determination apparently mailed to the petitioner on December 21, 2011. This proceeding ensued.

At the time of petitioner's May 10, 2011 parole interview Executive Law §259-1(2)(c)(A), which was amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provided, 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 . . ."

At the time of petitioner's May 10, 2011 Parole Board interview Executive Law §259-c(4) provided, in relevant part, that the Board of Parole shall " . . .establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011[2], to provide that the New York State Board of Parole 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 maybe released to parole supervision . . ." (Emphasis added).

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, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. 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

[2] L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

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.

In an apparent attempt to reference the amended version of Executive Law §259-c(4), petitioner asserts as follows: "Executive Law §259(c) [sic] requires the board to 'incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release.' The parole panel did not apply in petitioner's case standards outlined in Executive Law §259(c) [sic]." In support of this assertion petitioner cites, *inter alia*, the December 21, 2011 determination of the Supreme Court, Orange County, in *Thwaites v. New York State Board of Parole*, 34 Misc 3d 694.

Notwithstanding the fact that the 2011 amendment to Executive Law §259-c(4) was designated by the legislature as taking effect on September 30, 2012, the *Thwaites* court found that the amendment had to be applied retroactively to Mr. Thwaites' March 16, 2010 parole denial determination. This Court, however, respectively disagrees with the conclusions of the *Thwaites* court and, for the reasons set forth in the March 6, 2012 Decision and Judgment of the Supreme Court, Albany County (Hon. Richard M. Platkin) in *Hamilton v. New York State Division of Parole*, ___ Misc 3d___, 2012 Slip Op 22112, finds no basis to apply the amended version of Executive Law §259-c(4) in reviewing the parole denial determination of May 16, 2012. As stated by the *Hamilton* court, "[i]t is apparent . . . that 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." *Id* at ___. In the case at bar, as was the case in *Hamilton*, the challenged parole denial determination was rendered prior to the September 30, 2012 effective date of the amendment to Executive

Law §259-c(4). Although the determination denying petitioner's administrative appeal was rendered in December 2012, after the effective date of the statutory amendment in question, this Court finds that the determination on administrative appeal would involve a review of the propriety of the May 16, 2011 parole denial determination in accordance with the statutory provisions in effect on May 16, 2011.

Petitioner next asserts a challenge to the underlying parole denial determination " . . . based upon the parole panel's failure to articulate any rational, nonconclusory basis, other than its reliance on the petitioner's criminal history and the seriousness of the crime. In addition, the parole panel alleged that petitioner had a poor record of [institutional] adjustment with multiple [disciplinary] infractions. Petitioner pointed out that some of those infractions were reversed by state court but DOCCS would not remove them from his records."

A parole board 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 Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. 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, a review of the Inmate Status Report and transcript of the parole interview reveals that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming achievements, disciplinary record, release plans, as well as the circumstances of the crimes underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the transcript to suggest that the 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 McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. 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 bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying his current incarceration, his criminal history and institutional disciplinary record. *See Id.*

In the Inmate Status Report for Parole Board Appearance, prepared in anticipation of petitioner's May 2011 parole board appearance, the following is stated with respect to his inmate disciplinary record:

> "TAFARI HAS BEEN CITED FOR FIFTY-NINE TIER II-LEVEL DISCIPLINARY INFRACTIONS FOR VIOLATIONS INCLUDING DIRECT ORDER VIOLATION, FACILITY CORRESPONDENCE VIOLATION, CREATING A DISTURBANCE, INTERFERENCE, UNAUTHORIZED EXCHANGE, OTHER INMATE CRIMINAL INFORMATION, HARASSMENT, THREAT, PROPERTY IN AN UNAUTHORIZED LOCATION, SMUGGLING, LOSS/DAMAGE OF PROPERTY, CONTRABAND, TAMPER WITH PROPERTY, SEARCH/FRISK, FLOODING, SOLICITING, UNAUTHORIZED EXCHANGE AND UNAUTHORIZED ORGANIZATION. SIXTY-FOUR TIER III-LEVEL

> INFRACTIONS ARE NOTED FOR VIOLATIONS INCLUDING VIOLENT CONDUCT, THREAT, CREATING A DISTURBANCE, HARASSMENT, DIRECT ORDER, INTERFERENCE, CONTRABAND, OTHER INMATE CRIMINAL INFORMATION, GAMBLING, UNAUTHORIZED LEGAL, SMUGGLING, STALKING, SEARCH/FRISK, PROPERTY IN AN UNAUTHORIZED LOCATION, HEARING DISPOSITION, UTENSIL, TAMPER WITH PROPERTY, SEX OFFENSE, FACILITY VISITATION, VIOLENT CONDUCT, ASSAULT OF STAFF, UNHYGIENIC ACT, ESCAPE ITEMS, FACILITY CORRESPONDENCE, IMPERSONATION, URINALYSIS, WEAPON POSSESSION, ARSON, ASSAULT ON INMATE AND DRUGS.
> TAFARI HAS BEENED [sic] ASSESSED 109 MONTHS RECOMMENDED LOSS OF GOOD TIME AND IS SCHEDULED TO REMAIN IN S.H.U. [SPECIAL HOUSING UNIT] UNTIL 6/17/2016."

In his Memorandum of Law petitioner references three instances where findings of guilt at prison disciplinary hearings, although subsequently reversed/expunged, nevertheless remained a part of his institutional record. Although the specifics of the three disciplinary proceedings in question are not fully articulated, the reversals were allegedly the results of an August 9, 2001 determination of the Supreme Court, Wyoming County (Index #19,235), a June 12, 2003 determination of the Appellate Division, Third Department (Docket #92805) and a January 24, 2003 administration memorandum reversing a "tier hearing" completed on December 16, 2002. At this juncture it is noted that a separate Article 78 proceeding is currently pending in this Court (*Tafari v. Fischer and Rock*, Index # 2012-0021) wherein petitioner " . . . seeks to enforced [sic] two court orders and one Deputy Superintendent order, reversing three tier II dispositions which the respondent's [sic] refused to expunge from petitioner's record . . ." It is clear from the record in Index # 2012-0021 that the three Tier II Disciplinary Hearings that are the subject of that proceeding are the same three disciplinary proceedings referenced in this proceeding. Details of the three disciplinary proceedings, as gleaned from the record in Index#2012-0021, are as follows: (1) Tier II Disciplinary Hearing held at the Attica Correctional Facility on May 16, 2001; (2) Tier II Disciplinary Hearing held at the

Southport Correctional Facility on April 3, 2002; and (3) Tier II Disciplinary Hearing held at the Wende Correctional Facility commencing on December 10, 2002 and concluding on December 16, 2002. In the proceeding under Index # 2012-21 a motion to dismiss the underlying petition as moot is currently pending. The motion to dismiss is predicated on the assertion that on April 11, 2012 the results of the three above-referenced Tier II Disciplinary Hearings were again directed to be expunged.

Based upon the foregoing, the Court finds that when the May 16, 2011 parole denial determination that is the subject of the case at bar was issued, petitioner's institutional disciplinary record erroneously included references the results and dispositions of the three Tier II Disciplinary Proceedings detailed in the preceding paragraph. In this regard it is noted that the March 8, 2012 Inmate Disciplinary History printout for the petitioner, a copy of which is annexed to the respondent's Answer as Exhibit K, includes references to the records of the three Tier II Disciplinary Hearings in question on pages nine and ten thereof. Notwithstanding the foregoing, for the reasons set forth below the Court finds no basis to vacate the May 16, 2011 parole denial determination.

Where erroneous information serves as a basis for a parole denial determination, such determination must be vacated and a new hearing order. *See Smith v. New York State Board of Parole,* 34 AD3d 1156, *Hughes v. New York State Division of Parole,* 21 AD3d 1176 and *Lewis v. Travis*, 9 AD3d 800. The parole denial determination in the case at bar, however, was not based, even in part, on any particular instance or number of prison disciplinary violations. Rather, the parole denial determination cited petitioner's " . . . POOR RECORD OF ADJUSTMENT WHILE IN PRISON WHICH INCLUDES MULTIPLE TIER II INFRACTIONS AND MULTIPLE TIER III INFRACTIONS." This statement remains accurate whether petitioner had been found guilty of 59 Tier II-level disciplinary violations and 64 Tier III-level disciplinary violations, as erroneously

reported in the Inmate Status Report, or 56 Tier II-level violations and 64 Tier III-level violations, as should have been reported. The Court also notes that none of the erroneously-reported disciplinary violations were of recent vintage or were heard at the more serious Tier III level. Given the extraordinary number of disciplinary infractions incurred by petitioner during the course of his incarceration, both Tier II and Tier III, and in the absence of any indication in the record that the Parole Board gave particular consideration to the facts and circumstances underlying any of the three erroneously reported disciplinary infractions, the Court finds that the erroneous information before the Board, as set forth in the Inmate Status Report, did not serve as a basis for the May 16, 2011 parole denial determination. *See Sutherland v. Evans,* 82 AD3d 1428 and *Restivo v. New York State Board of Parole*, 70 AD3d 1096. *See also McAllister v. New York State Division of Parole,* 70 AD3d 1413.

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: July 12, 2012 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice