STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of STUART WINKLER,

Petitioner,

-against-

COMMISSIONER ANDREA W. EVANS,
CHAIRWOMAN OF THE 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-ST3366 Index No. 7915-11

Appearances: Stuart Winkler
Inmate No. 01-A-0384
Petitioner, Pro Se
Sullivan Correctional Facility
P.O. Box 116
325 Riverside Drive
Fallsburg, NY 12733-0116

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Kevin P. Hickey,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Sullivan Correctiona! Facility, commenced the instant

CPLR Article 78 proceeding to review a determination of respondent dated April 5, 2011 to deny petitioner discretionary release on parole. The petitioner is serving an indeterminate term of imprisonment of 8 1/3 to 25 years for conspiracy in the second degree, and a term of 3 to 9 years for enterprise corruption. The conspiracy involved a plot to kill the judge presiding over the criminal trial of charges of enterprise corruption. Among the many arguments advanced by the petitioner, he contends that the determination of the Parole Board to deny release was a clear case of being arbitrary and capricious and an abuse of discretion which demonstrates irrationality bordering on impropriety. He maintains that the Parole Board did not consider whether there was a reasonable possibility that if released, he would live and remain at liberty without violating the law. In his view, the Parole Board failed to follow its own rules and regulations and did not consider the relevant factors under Executive Law § 259-i. He indicates that he graduated from college with an accounting degree in June 1974. He worked for twenty-five years in accounting and auditing. He asserts that he started a business which employed 450 professionals. He claims he created 40,000 jobs, and paid millions of dollars in income taxes. While raising a family he served as a Little League baseball manager and travel soccer coach.

With respect to the conspiracy charge, he indicates that his former cell mate and co-conspirator, Karl Ligon has a lengthy criminal history involving violent felonies. He draws a comparison between himself and Ligon, arguing that although in his view Ligon is a far more dangerous individual than the petitioner, Ligon was allegedly released sixty days after

petitioner's conviction.[1] The petitioner also maintains that the Parole Board erred in not applying amendments to Executive Law § 259-i adopted by the State Legislature in 2011 (see L 2011, Ch 62). Lastly, he argues that the 24 month hold was excessive.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Denied - Hold for 24 months, March 2013
>
> "Parole is denied for the following reasons:
> After a review of the record and this interview, it is the determination of this panel that your release at this time is incompatible with the welfare and safety of the community
>
> "This decision is based on the following factors: The instant offense of conpiracy 2nd and enterprise corruption involved you conspiring with another to murder the judge on the case of the instant offense of enterprise corruption. In a scheme to defraud, you operating as the chief financial officer, acting in concert sold stock to investors, using lies and misinterpretations while making illegal profits from side deals, Also, incriminating documents were destroyed. Note is made of your positive programing, clean disciplinary record, and parole packet; however, all relevant factors considered, discretionary release is inappropriate at this time. For the panel to hold otherwise would so deprecate the seriousness of the crimes as to undermine respect for the law.

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.,

---

[1]To support this contention the petitioner makes reference to testimony which Ligon gave at trial in which he allegedly admitted to a life-long history of crime involving drugs, weapons, shootings, and robberies.

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 offenses, attention was paid to such factors as petitioner's disciplinary record and his plans upon release. He was afforded ample time to make comments supportive of his release, most of which were devoted to describing his success as a businessman, and the accomplishments of his children. 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). 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 MacKenzie v Evans, supra; 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).

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 the amendment to Executive Law 259-c be applied retroactively to parole determinations rendered prior to October 1, 2011 (see id.; see also Matter of Tafari v Evans, 2012 NY Slip Op 51355U [Sup. Ct., Franklin Co., 2012])

In addition, 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: August 27, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated January 9, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 30, 2012, Supporting Papers and Exhibits
3. Petitioner's Reply dated May 30, 2012