STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
LUIS FELICIANO, 07-A-3332

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE
APPEALS UNIT,

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-ST3398 Index No. 4766-12

Appearances: Luis Feliciano
Inmate No. 07-A-3332
Self represented Petitioner
Livingston Correctional Facility
P.O. Box 91
Sonyea, New York 14556

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224-0341
(Laura A. Sprague, Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Livingston Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a denial of parole. Petitioner argues that the Parole Board decision was improperly based upon the serious nature of the crime without consideration of his

Earned Eligibility Certificate or amendments to Executive Law effective in 2011.

Petitioner was convicted by plea of the crime of Criminal Sale of a Controlled Substance 4th degree on 4/14/92. Petitioner was sentenced to 6 months imprisonment and 5 years probation. Petitioner absconded and was later located in prison in the State of Pennsylvania. Petitioner was convicted in Pennsylvania for the killing of his pregnant girlfriend. Upon completion of his imprisonment petitioner was returned to New York where he was resentenced on June 6, 2007 to a term of 5 to 15 years on the Criminal Sale of a Controlled Substance conviction. The parole denial being challenged arises from his initial appearance before the Board on January 31, 2012.

In its decision denying Petitioner parole release, the Board stated:

Denied 24 months; 1/2014

Despite receipt of an Earned Eligibility Certificate, after a careful review of your record, a personal interview and deliberation, parole is denied.
Your institutional record and release plans are noted.
Required statutory factors have been considered, including your risk to the community, rehabilitation efforts and your needs for successful re-integration into the community.
This panel remains concerned, however, about your lengthy history of unlawful conduct, which, when considered with required and relevant factors, leads to the conclusion, that if released at this time, there is a reasonable probability that your would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community.
You appear before this Panel with the serious instant offense of criminal sale of controlled substance fourth; wherein, you sold cocaine. Your record includes a felony conviction in Pennsylvania for killing a victim with a gun.
Consideration has been given to your receipt of an Earned Eligibility Certificate, an assessment of your risks and needs for success on parole, any program completion and any satisfactory behavior; however, your release at this time is denied.

Petitioner filed an administrative appeal by filing an Appeal on April 12, 2012. The Appeals Unit affirmed the Board's decision, mailing such decision to petitioner on October 4,

2012. This article 78 petition is verified August 10, 2012 and stamped by the office of the Albany County Combined Courts on August 20, 2012.

Petitioner asserts that the Parole Board actions were arbitrary, capricious, or irrational, in that (i) it only considered the crimes he was convicted of without consideration of his Earned Eligibility Certificate and (ii) that the decision of the Board lacked consideration of the 2011 amendments to Executive Law 259.

Petitioner in paragraph 8 of his petition recites "As the terms of Correction Law makes plain the receipt of an Earned Eligibility Certificate does not preclude the Board from Denying Parole, nor does it eliminate the Board's discretion in making the release decision,..." While conceding the Board's discretionary authority petitioner argues that the decision itself lacked a reasonable or rational explanation in denying petitioner release to parole. Petitioner contends the decision fails to provide sufficient details for parole denial. Although petitioner received an Earned Eligibility Certificate, he is not automatically entitled to discretionary parole release, Matter of Dorman v New York State Division of Parole, 30 AD3d 880 (Third Dept. 2006).

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, see Reed v Evans, 94 AD3d 1323 (Third Dept. 2012). A review of the transcript of the parole interview[1] reveals that, in addition to the instant offense which petitioner admitted to details of at the parole interview, petitioner admitted to the killing of his girlfriend with a gun; attention was paid to such factors as petitioner's completion of vocational programs, his clean disciplinary record and his plans for a mechanic's job and living arrangements upon release. Petitioner was afforded ample time in the hearing to make comments supportive of his release, petitioner expressed his regret for the harm he caused other individuals and for the bad decisions he made while under the influence of controlled substances.

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

[1] Transcript of parole interview, Respondent's exhibit E .

v Evans, 95 AD3d 1613 [3d Dept., 2012]; 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 amended Executive Law Section 259-c, as it relates to parole determinations to 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 subsection now recites: "[t]he state board of parole shall [259-c] (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". This amendment was made effective six months after its

adoption on March 31, 2011, that is, on October 1, 2011. 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. This amendment was effective immediately upon its adoption on March 31, 2011. Under the former law the factors to be considered were listed in different sections of the Executive Law. The amendment did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision but placed the factors in one section. As a result, the factors for the Board to consider in determining whether Petitioner should be released to parole are the same whether under the former version of Executive Law 259-i or the current one. On October 5, 2011 the Chairperson of the Parole Board issued a Memo[2] containing the written procedure to be followed by the Board in making parole decisions. The memo makes it clear that steps taken by an inmate toward rehabilitation are to be discussed at the interview. The record does establish that the statutory criteria were considered. Petitioner's claim that the respondent failed to consider the 2011 amendments to the Executive Law is without merit.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner

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[2] Respondent's Exhibit K

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: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 10, 2012
2. Verified Petition dated August 10, 2012
3. Answer Dated November 13, 2012
4. Affirmation of Laura A. Sprague, Esq.dated November 13, 2012 with exhibits
5. Reply affidavit with Exhibit dated November 21, 2012

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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: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice