Matter of Arroyo v NYS Bd. of Parole
2013 NY Slip Op 33100(U)
December 9, 2013
Supreme Court, Franklin County
Docket Number: 2013-343
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
DIEGO ARROYO, #05-B-2056,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2013-0170.45
INDEX # 2013-343
ORI #NY016015J

-against-

NYS BOARD OF PAROLE,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Diego Arroyo, verified on April 3, 2013 and filed in the Franklin County Clerk's office on April 19, 2013. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the February, 2012 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on April 23, 2013 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on July 12, 2013 and supported by the July 12, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. No Reply has been received from petitioner.

On May 23, 2002 petitioner was apparently sentenced in Supreme Court, New York County, to an indeterminate sentence of 3½ years to life upon his conviction of the crime of Criminal Sale of a Controlled Substance 2°. After completing the DOCCS Shock Incarceration Program petitioner was released to parole supervision in January of 2003. Upon a delinquency in December of 2003 petitioner was revoked and restored to the Willard Drug Treatment program prior to being re-released to community-based parole supervision. Petitioner committed a new criminal offense in March of 2005 and on July 7,

2005 he was sentenced in Supreme Court, Oneida County, to a determinate term of 8 years, with 5 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 1°.[1]

Petitioner made his initial post-2005 sentencing appearance before a Parole Board on February 7, 2012. Following that appearance a decision was rendered denying him parole and directing that he be held for an additional 24 months. The parole denial determination reads as follow:

> "PAROLE DENIED. AFTER A PERSONAL INTERVIEW, RECORD REVIEW AND DELIBERATION, THIS PANEL FINDS YOUR RELEASE IS INCOMPATIBLE WITH THE PUBLIC SAFETY AND WELFARE. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL COMMUNITY REINTEGRATION.
>
> YOUR INSTANT OFFENSE OF CPCS 1ST OCCURRED WHILE YOU WERE ON PAROLE SUPERVISION.
>
> CONSIDERATION HAS BEEN GIVEN TO YOUR DENIAL OF AN EARNED ELIGIBILITY AND RECEIPT OF MULTIPLE DISCIPLINARY VIOLATIONS DURING THIS TERM.
>
> DUE TO YOUR POOR RECORD ON PAROLE AND POOR COMPLIANCE WITH DOCCS RULES, YOUR RELEASE AT THIS TIME IS DENIED. THERE IS REASONABLE PROBABILITY YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW."

The document perfecting petitioner's administrative appeals from the parole denial determination was received by the DOCCS Parole Appeals Unit on July 18, 2012. A decision on administrative appeal upholding the February 2012 parole denial determination was rendered on or about February 25, 2013. This proceeding ensued.

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[1] Petitioner was originally sentenced to a determinate term of 8 years without mention of the period of post-release supervision. He was re-sentenced on January 26, 2011, however, to the same 8-year determinate term but with a 5-year period of post-release supervision specified.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, 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 . . ."

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 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.

Petitioner, incorporating by reference his brief on administrative appeal, advances several arguments in support of his ultimate contention that the February 2012 parole

denial determination must be vacated. The Court is most concerned at this juncture with petitioner's claim that the Parole Board " . . . relied almost entirely on the instant offense and criminal history to deny parole. There was no future focused risk assessment that the new amendments to Executive Law [§259-c(4)] require." That statute was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, 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 may be released to parole supervision . . ."[2]

Since petitioner does not specifically challenge the implementation procedures put into effect by the board of Parole in response to the amendment to Executive Law §259-c(4), such issue will not be addressed in this Decision and Judgment. The Court nevertheless notes that the Appellate Division, Third Department, has repeatedly overturned parole denial determinations based upon the Board's failure to utilize COMPAS risk and needs assessment instruments in connection with post-September 2011 parole release hearings. *See Linares v. Evans,* ___ AD3d ___, 2013 NY Slip Op 08189, *Malerba v. Evans,* 109 AD3d 1067 and *Garfield v. Evans*, 108 AD3d 830. In reaching its decision in *Linares*, the Appellate Division, Third Department, found as follows:

> "Petitioner is entitled to a new parole hearing due to the Board's failure to use a 'COMPAS Risk and Needs Assessment' instrument, which is a document created and intended to bring the Board into compliance with the recent amendments to Executive Law §259-c(4)." (Citations omitted).

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[2]Prior to the amendment the statute had 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 . . ."

In the absence of any indication in the record that a COMPAS risk and needs assessment instrument was utilized in connection with petitioner's February 7, 2012 Parole Board appearance and the ensuing parole denial determination, this Court finds the decisions of the Appellate Division, Third Department in *Linares*, *Malerba* and *Garfield* to be dispositive and, therefore, further finds that the parole denial determination in the case at bar must be overturned with a *de novo* hearing ordered. In view of this result, the Court finds no need to address petitioner's remaining causes of action.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs and disbursements, but only to the extent that the February 2012 parole denial determination is overturned and the matter remanded for *de novo* parole release consideration, before a different Parole Board, within 45 days of the date of this Decision and Judgment, in a manner not inconsistent with this Decision and Judgment.

Dated: December 9, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice