

<b>Matter of Kozlowski v New York State Bd. of Parole</b>
2013 NY Slip Op 30265(U)
February 5, 2013
Sup Ct, New York County
Docket Number: 104097/12
Judge: Carol E. Huff
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CAROL E. HUFF  
Justice

PART 32

Index Number : 104097/2012  
KOZLOWSKI, L. DENNIS  
vs.  
NYS BOARD OF PAROLE  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this ~~\_\_\_\_\_~~

Motion is decided in accordance

with accompanying memorandum decision

### UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1402).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: FEB 05 2013

[Signature], J.S.C.

**CAROL E. HUFF**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of L. DENNIS KOZLOWSKI, : Index No. 104097/12  
Petitioner, :  
For a Judgment Pursuant to CPLR Article 78, :  
- against - :  
NEW YORK STATE BOARD OF PAROLE, :  
Respondent. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner, an incarcerated person, seeks to annul the Determination of respondent New York State Board of Parole dated April 4, 2012, which denied his application for parole. Petitioner contends that the Board issued a conclusory determination that was inadequate on its face, that it failed to comply with requisite procedures and that it relied on erroneous information.

Petitioner was convicted of thirteen counts of first-degree Grand Larceny, one count each of fourth-degree Conspiracy and Violation of General Business Law § 352-c(5), and eight counts of first-degree Falsifying a Business Record. He was given an indeterminate sentence of eight and one-third to twenty-five years.

Petitioner sought merit time release pursuant to 7 NYCRR § 280. Having met certain criteria set forth in the statute, an inmate is entitled to seek parole before his minimum sentence has elapsed. In such a case the Board of Parole must use the same criteria as in a normal parole

release determination. See Executive Law § 259-i(2)(c)(A), which provides:

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 law.

The Parole Board is required to consider factors including the inmate's institutional record, his performance in a temporary release program, his plans for after release, statements made by victims of the inmate's crimes, any prior criminal record and:

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. . . .

Id.

“[S]o long as the Board's discretion is exercised in accordance with the statutory requirements, its discretion in matters of parole release is not judicially reviewable.” People ex rel. Herbert v New York State Board of Parole, 97 AD2d 128, 131 (1<sup>st</sup> Dept 1983). “The Board is not required to articulate every statutory factor considered in making its decision or to give each such factor equal weight.” Nicoletta v New York State Div. of Parole, 74 AD3d 1609 (3d Dept 2010). However, “where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene.” King v New York State Div. of Parole, 190 AD2d 423, 431 (1<sup>st</sup> Dept 1993). In all cases, when denying a parole application the Board is required to state in writing “the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.” Executive Law § 259-i(2)(a).

The April 4, 2012, Determination of the Board of Parole, in its entirety, is as follows:

Following careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered. Your instant offenses are the result of your theft of over one-hundred million dollars from Tyco, an international public corporation, in glaring violation of the trust placed in you as CEO by the board of directors and corporate shareholders. The former chief financial officer of Tyco was your co-defendants [sic]. The instant offenses are your only offenses of record. Your institutional programming indicates progress and achievement which is noted to your credit. Your disciplinary record appears clean and is likewise noted. Your receipt of a merit certificate is acknowledged and considered by the panel.

Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community re-entry.

Your discretionary release, at this time, would thus not be compatible with the welfare of society at large, and would tend to deprecate the seriousness of the instant offense(s), and undermine respect for the law.

The Determination is almost entirely conclusory, and requires the Court to rely on speculation to attempt to understand how it was decided that the granting of parole would deprecate the seriousness of the offense and undermine respect for law, or affect "public safety and welfare."

It appears that the Board of Parole relied exclusively on the seriousness of petitioner's crime in reaching its Determination. In King, supra, at 432, the First Department found that the a Board's determination denying parole cannot be based solely on the seriousness of the crime:

[T]he only statutory criterion [stated in] the Board's determination to deny the application was its finding that petitioner's release would so deprecate the seriousness of his crime as to undermine respect for law by reason of the fact that the victim of the crime was a police officer. The legislature, however, has not defined "seriousness of [the] crime" in terms of specific categories of either crimes or victims and it is apparent that in order to preclude the granting of parole exclusively on this ground there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime.

See also Wallman v Travis, 18 AD3d 304, 307 (1<sup>st</sup> Dept 2005) (“A Parole Board’s exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant”).

Respondent argues that, in light of the nature of the crime, “no reasonable person can conclude that aggravating factors are not present in the instant matter. . . .” (Answer, at ¶ 35), but this statement is not supported by case law. The cases respondent cites all concern violent offenses. It may be that factors present in petitioner’s crimes do exist to support the Board’s finding, but those factors have not been identified. Nor have any “factors and reasons” been given “in detail” as to why petitioner’s release would undermine public safety and welfare.

Because in its Determination the Board of Parole has not sufficiently detailed its reasons for denying petitioner parole, the petition is granted to the extent that the Determination is annulled and the matter is remanded to the Board for a de novo hearing and a determination consistent with the requirements of Executive Law § 259-i(2)(a).

Accordingly, it is

ADJUDGED that the petition is granted to the extent that the Determination is annulled and the matter is remanded to the Board for a de novo hearing and a determination consistent with the requirements of Executive Law § 259-i(2)(a); and it is further

ADJUDGED that the petition is otherwise denied.

Dated: **FEB 05 2013**

  
**CAROL E. HUFF**  
J.S.C.