

Matter of Ying Kit Lau v Evans
2013 NY Slip Op 30539(U)
March 12, 2013
Supreme Court, New York County
Docket Number: 402202/12
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
YING KAT LAU,

INDEX No. 402202/12

Petitioner,
-against-

MOTION DATE _____

ANDREA W. EVANS, CHAIRWOMAN NYS
BOARD OF PAROLE,

MOTION SEQ. NO. 001

Respondent.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is granted

DECIDED IN ACCORDANCE WITH SECTION 57 OF THE JUDICIAL BRANCH OF THE STATE JUDICATURE AND THE RULES OF THE COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF NEW YORK.

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 141B).

Dated: 3 / 12 / 13

DM Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
In the Matter of the Application of
YING KIT LAU,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules.

-against-

Index No. 402202/12

ANDREA W. EVANS, CHAIRWOMAN, NYS
BOARD OF PAROLE,

UNFILED JUDGMENT

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-----X

Donna M. Mills, J.:

Petitioner Ying Kit Lau seeks an order, pursuant to Article 78 of the CPLR,
vacating the September 4, 2012 decision of the New York State Board of Parole
(PAROLE BOARD) denying him parole and granting him either immediate release on
parole or a de novo parole hearing. Respondent Andrea W. Evans (Evans),
Chairwoman of the PAROLE BOARD, opposes the petition and seeks its dismissal.

The Petitioner, is presently a Temporary Release inmate at the Lincoln
Correctional Facility, located in New York City, New York. He is incarcerated pursuant
to two separate events. First, he was convicted of attempted enterprise corruption and
the second, involving identity theft. He was thereafter sentenced to concurrent
indeterminate terms with an aggregate judgment of three years and six months to
seven years. The maximum expiration date of his sentence is presently September 3,
2015, and his conditional release date is May 3, 2013.

Petitioner last appeared before the Parole Board on September 27, 2011 and
was denied release on parole on or about September 28, 2011, when he was denied

parole and ordered held for another 24 months before his next interview. The Parole Board determined that release "would be incompatible with the welfare and safety of the community." The Board added that "discretionary release . . . is not granted merely as a reward for good conduct or positive programming while incarcerated," and noted that petitioner violated community supervision in the past," and that he had a "a well established pattern of criminal behavior that has been undeterred by prior court sanctions, and leniency. . . by the criminal justice system."

Petitioner submitted an administrative appeal, received by the Appeals Unit of the Board on October 31, 2011. On September 4, 2012, the Board issued a decision affirming the denial of parole to Petitioner.

On September 16, 2012, Petitioner filed this Petition, challenging the denial of his release on parole. In the Petition, Petitioner claims that he should have been granted release because: (1) he committed non-violent crimes, was remorseful, and trying to better himself and took full responsibility for his role in the instant offenses; (2) he has an exceptional institutional record in prison, and was issued an Earned Eligibility Certificate; (3) he has completed the CASAT program, and is in the Work Release Program at the Lincoln Correctional Facility since August 27, 2010.

The applicable standard of review is whether the administrative decision was: (1) made in violation of lawful procedure; (2) affected by an error of law; or (3) arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR 7803 [3]). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made

* 4]

services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services ... (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; ... Notwithstanding the provisions of this section, in making the parole release decision for persons whose minimum period of imprisonment was not fixed pursuant to the provisions of subdivision one of this section, in addition to the factors listed in this paragraph the board shall consider the factors listed in paragraph (a) of subdivision one of this section.

The above-mentioned Executive Law § 259-i(1)(a) lists the guidelines to be considered by the Parole Board and:

shall include (i) 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 pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

Further, § 259-i(1)(a) states that "the notification of the Parole Board's determination and of any subsequent determinations and of the reasons therefor shall be furnished in writing to the sentenced person and to the person in charge of the institution as soon as practicable. Such reasons shall be given in detail and not in conclusory terms."

The September 4, 2012 Administrative Appeal Decision & Findings demonstrates that the PAROLE BOARD considered the necessary statutory factors in weighing whether to grant discretionary parole release to petitioner.

Petitioner in support of his request for relief, notes that an inmate's exemplary conduct during his or her imprisonment may be considered as a relevant factor during his parole hearing. However, as previously observed, "discretionary release on parole

shall not be granted merely as a reward for good conduct." (Executive Law Section 259-i[2][c][A]). Further, "while the relevant statutory factors must be considered, it is well settled that the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board." (Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415 [1st Dept. 1997]). (See Klein v. New York State Div. of Parole, 202 A.D.2d 319, 320, 609 N.Y.S.2d 208 [1st Dept. 1994]; McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204 [3d Dept. 1990]; People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 133, 468 N.Y.S.2d 881 [1st Dept. 1983]). Petitioner's claim that he should be released because of his successful efforts at rehabilitation does not pass muster in the face of the statutory framework. Successful rehabilitation effort is but one of the many factors to be considered by the PAROLE BOARD in determining if an inmate is granted discretionary parole release.

Therefore, the PAROLE BOARD made its September 4, 2012 determination with respect to petitioner in accordance with pertinent statutory requirements. The grounds for parole denial stated by the PAROLE BOARD are sufficient to support the PAROLE BOARD's denial of parole to petitioner. Petitioner has failed to demonstrate to the Court that the September 4, 2012 decision of the PAROLE BOARD is arbitrary, capricious, an abuse of discretion or irrationality bordering on impropriety.

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 3/12/13

UNFILED JUDGMENT
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 J.S.C. *DM*

DONNA M. MILLS, J.S.C.