STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
GREGORY J. GILBERT, #11-A-4411,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2012-0420.102
INDEX # 2012-913
ORI #NY016015J

BRIAN FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, and **ANDREA EVANS**, Chairwoman, New York State Board of Parole,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Gregory J. Gilbert, verified on October 24, 2012 and received directly in chambers on October 29, 2012. The petition was filed in the Franklin County Clerk's office on November 1, 2012. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the November 2011 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on October 30, 2012 and has received and reviewed respondents' Answer, including Confidential Exhibit's B and D, verified on December 20, 2012. No Reply thereto has been received from petitioner.

On September 26, 2011 petitioner was sentenced in St. Lawrence County Court to a controlling indeterminate sentence of 1⅓ to 4 years upon his convictions of two counts

of the crime of Criminal Contempt 1°.[1] Petitioner made his initial appearance before a Parole Board on November 29, 2011. The Court notes that with a controlling minimum period of imprisonment of 1⅓ years and 386 days of jail time credit, petitioner's initial Parole Board appearance occurred less than two months after he was received into DOCCS custody. Following petitioner's initial appearance a decision was rendered denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "AFTER A CAREFUL REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY.
>
> THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE IS TWO COUNTS OF CRIMINAL CONTEMPT 1ST FOR WHICH YOU ARE SERVING 1⅓ - 4 YEARS. THIS CRIME IS THE CONTINUATION OF A CRIMINAL HISTORY WHICH INCLUDES PRIOR CRIMINAL CONTEMPT 2ND CONVICTIONS. YOU HAVE BEEN UNDETERRED BY PRIOR COURT INTERVENTIONS AND HAVE DONE POORLY IN THE PAST UNDER COMMUNITY SUPERVISION.
>
> THE BOARD NOTES YOUR LETTERS OF SUPPORT AND GOOD DISCIPLINE WHILE IN PRISON.
>
> ALL FACTORS CONSIDERED, YOUR RELEASE AT THIS TIME IS NOT WARRANTED."

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[1] Identical indeterminate sentences of 1⅓ to 4 years were imposed in connection with each count. The two counts arose from criminal conduct occurring on two different days and were set forth in separate indictments (2011-124 and 2011-125). The sentence and commitment order associated with the count set forth in indictment #2011-124 indicated that the indeterminate sentence of 1⅓ to 4 years was to run concurrently with respect to the sentence imposed in connection with indictment #2011-125. The sentence and commitment order associated with the count set forth in indictment 2011-125, however, indicated that the indeterminate sentence of 1⅓ to 4 years was to run consecutively with respect to the sentence imposed in connection with indictment #2011-124. In any event, DOCCS officials have apparently calculated petitioner's sentences as running concurrently with respect to each other.

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on April 25, 2012. Although the Appeals Unit failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about November 5, 2012, after this proceeding had been commenced.

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.

In this proceeding petitioner argues, in effect, that the Parole Board improperly based its denial determination upon the nature of the crimes underlying his incarceration/prior criminal record[2] and, in the process, failed to adequately consider other mandatory statutory factors such as his institutional programing/disciplinary records and his release plans. A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination "... is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not

[2] On page four of the petition the petitioner references his criminal history as "non existing." To the extent such reference might be construed as an assertion that the Parole Board relied upon erroneous information with respect to petitioner's prior criminal record, the Court notes that its review of the Inmate Status Report prepared in an anticipation of petitioner's November 29, 2011 Parole Board appearance (Exhibit C annexed to respondents' Answer) reveals petitioner was twice convicted of the crime of Criminal Contempt 2° following arrests in August of 2007 and April of 2008. In addition, during the course of the November 29, 2011 Parole Board appearance, the following statement was directed to petitioner by a Parole Commissioner: "You have two prior Criminal Contempt 2nd degrees, you were under probation. It was revoked at one point and it seems like almost all of your troubles stem from the same type of thing, right?" Rather than denying the prior convictions petitioner simply responded "[i]t's the same person, yes."

required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Inmate Status Report and transcript of the November 29, 2011 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic programming record, clean disciplinary record and release plans, in addition to the circumstances of the crimes underlying his current incarceration and his prior criminal record. *See Zhang v. Travis*, 10 AD3d 828.

During the course of the November 29, 2011 Parole Board appearance there was little, if any, discussion with respect to the specific circumstances of the crimes underlying petitioner's incarceration. After noting that petitioner was incarcerated for two counts of the crime of Criminal Contempt 1° and that he was serving concurrent sentences of 1⅓ to 4 years, a Parole commissioner asked petitioner if there was anything he would like to say regarding the offenses. Petitioner responded with an extended discussion of his troubled nine-year relationship with the mother of his children, but provided no details with respect to the specific events leading to his convictions. Other than posing one question with respect to petitioner's prior criminal record (see footnote #2), the only other discussions initiated by the Parole commissioners were with respect to letters of support from petitioner's mother and a neighbor, petitioner's therapeutic programing history, his clean disciplinary record and release plans. The Court, moreover, finds nothing in the hearing transcript to suggest that the Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration as well as his prior criminal record. *See Allis v. New York State Division of Parole*, 68 AD3d 1309.

Before concluding the Court must also address petitioner's concerns with respect to the recent amendment to Executive Law §259-c(4). That statute, as amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011[3], provides 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 . . ." (Emphasis added). To the extent petitioner argues that the amended version of Executive Law §259-c(4) " . . . mandates that the Board of Parole cannot use the past criminal history or the current penal law offense to arrive at a conclusion for denying parole," the Court rejects such argument. Notwithstanding the amendment to Executive Law §259-c(4), a Parole Board considering an inmate for discretionary parole release

[3] L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

remains statutorily mandated to consider, among other factors, the seriousness of the offense(s) underlying such inmate's incarceration as well as his/her prior criminal record. *See* Executive Law §259-i(2)(c)(A)(vii) and (viii). Although the list of statutory factors to be considered by a Parole Board in connection with a discretionary parole release consideration (Executive Law §259-i(2)(c)(A)) was not changed by reason of the amendment to Executive Law §259-c(4), the amendment does require that the Parole Board's determination be rendered within a framework of " . . . written procedures [that] shall incorporate risk and needs principals to measure the rehabilitation of persons appearing before the board . . .[and] the likelihood of success of such persons upon release . . ." Executive Law §259-c(4).

This Court has serious reservations with respect to the issue of whether the October 5, 2011 memorandum of respondent Evans (a copy which is annexed to respondents' answer as Exhibit L) lawfully constitutes the "written procedures" referenced in the amended version of Executive Law §259-c(4). Notwithstanding such reservations, and in view of the unique circumstances of this case, as detailed below, the Court declines to reach the issue of respondents' compliance with the provisions of Executive Law §259-c(4) at this time. In this regard the Court again notes that petitioner was in DOCCS custody for less than two months prior to his November 29, 2011 Parole Board appearance. More importantly, the Court's review of Confidential Exhibit B (the pre-sentence investigation report prepared by the St. Lawrence County Department of Probation) indicates that a COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) assessment, which constitutes a risk and needs assessment instrument, was prepared with respect to the petitioner approximately four months prior to the November 29, 2011 Parole Board appearance. The COMPAS assessment apparently revealed that petitioner represented a "moderate to high risk for reoffense."

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

ADJUDGED, that the petition is dismissed.

Dated: April 1, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice