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

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In the Matter of the Application of
DAVID A. BURR, #84-B-0365,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0402.96
INDEX # 2012-866
ORI #NY016015J

-against-

ANDREA EVANS, Chairwoman,
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 David A. Burr, dated September 2, 2012 and filed in the Franklin County Clerk's office on September 24, 2012. Petitioner, who is an inmate at the Auburn Correctional Facility, is challenging the November 2011 determination denying him parole and directing he be held for an additional 24 months. An Order to Show Cause was issued on November 21, 2012. The Court has since received and reviewed respondent's Answer, including Confidential Exhibits B and D, verified on February 6, 2013 and supported by the February 6, 2013 Affirmation of Kevin P. Hickey, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, dated February 18, 2013 and filed in the Franklin County Clerk's office on February 22, 2013.

On January 6, 1983 petitioner was sentenced in Erie County Court to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2° and Assault 2°. Petitioner's conviction was affirmed on direct appeal to the Appellate Division, Fourth Department, and the Court of Appeals. *See People v. Burr*, 124 AD2d 5, *aff'd* 70 NY2d 354, *cert denied sub nom. Burr v. New York*, 485 US 989. Having been

denied discretionary parole release on two previous occasions, petitioner made his third appearance before a Parole Board on November 8, 2011. Following that appearance a decision was rendered again denying him parole and directing that he be held for an additional 24 months. The parole denial determination reads 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 IN BUFFALO IN JANUARY 1983 INVOLVED YOU, IN CONCERT, CAUSING THE DEATH OF A 19 YEAR OLD VICTIM BY STRANGULATION AND/OR STABBING.
>
> YOUR CRIMINAL HISTORY INDICATES THE INSTANT OFFENSES TO BE YOUR ONLY FELONIES OF RECORD.
>
> YOUR INSTITUTIONAL PROGRAMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED TO YOUR CREDIT. YOUR DSICIPLINARY [sic] RECORD REFLECTS TWO (2) TIER III REPORTS. YOU HAVE SERVED SHU TIME.
>
> 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."

Documents perfecting petitioner's administrative appeal from the November 2011 parole denial determination were received by the DOCCS Parole Appeals Unit on April 9, 2012 and April 16, 2012. The Appeals Unit, however, failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

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 sets forth seventeen separately numbered causes of action in support of his ultimate contention that the November 2011 parole denial determination must be overturned. The Court is most concerned at this juncture with petitioner's arguments (primarily set forth in his seventeenth causes of action) addressing the 2011 amendment

to Executive Law §259-c(4). 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 . . ."[1]

In petitioner's first cause of action he asserts, in conclusory fashion, that the respondent ". . . failed to heed the statutory criteria of Executive Law §259-c-(4) . . ." In his seventeenth cause of action, however, petitioner alleges that the respondent failed to apply the amended version of Executive Law §259-c(4) to his November 8, 2011 Parole Board interview and the ensuing parole denial determination.[2] Before considering petitioner's seventeenth cause of action, however, the Court finds it appropriate to consider the October 5, 2011 Memorandum of Andrea W. Evans, then Chairwoman, New York State Board of Parole, addressing the amendments to Executive Law §259-c(4) (hereinafter, the "Evans Memorandum"). A copy of the Evans Memorandum is annexed to the respondent's Answer as Exhibit I.

In the Evans Memorandum the Chairwoman writes, in part, as follows:

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[1]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 . . ."

[2] In his seventeenth cause of action petitioner references a "memorandum" allegedly issued by the respondent to DOCCS Commissioner Brian S. Fischer concerning a November 10, 2011 meeting with a particular assembly member wherein the effective date of the amendment to Executive Law §259-c(4) was "changed" to several dates in 2012. The record in this proceeding does not contain a copy of the alleged November 10, 2011 memorandum. Nevertheless, this Court finds that petitioner's seventeenth cause of action sufficiently sets forth a claim that the amended verison of Executive Law §259-c(4) should have been applied in his case.

> ". . . [M]embers of the [Parole] Board had been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ('TAP'). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board were afforded training in July 2011 in the use of the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool [COMPAS] to understand the interplay between that instrument and the TAP instrument, as well as understanding what each of the risk levels mean."

The Evans Memorandum goes on to state ". . . that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider [Executive Law §259-i(2)(c)(A)] has not changed through the aforementioned legislation [amendment to Executive Law §259-c(4)] . . ." After specifically setting forth the statutory factors set forth in Executive Law §259-i(2)(c)(A), the Evans Memorandum concludes as follows:

> "Therefore, in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate towards effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations."

When confronted with issue of whether or not the Evans Memorandum, which has apparently not been adopted as a formal rule (*see* Executive Law 259-c(11) and State Administrative Procedure Act §§202 and 203), can lawfully constitute the "written procedures" mandated pursuant to the amended version of Executive Law §259-c(4),

lower courts have reached different conclusions. *Compare Morris v. New York State Department of Corrections and Community Supervision*, 40 Misc 3d 226 [Sup Ct Columbia County, April 12, 2013] *with Partee v. Evans*, __ Misc 3d __, 2013 NY Slip Op 23216 [Sup Ct Albany County, June 28, 2013]. Although this specific issue has not been addressed at the appellate level, the Appellate Division, Third Department, recently overturned a parole denial determination based upon the Board's failure to utilize a COMPAS risk and needs assessment instrument in connection with an October 2011 hearing. *See Garfield v. Evans*, 108 AD3d 830 [July 3, 2013]. In reaching its decision the *Garfield* court found as follows:

> "Significantly, Executive Law §259-c(4) requires that the Board 'establish written procedures for its use in making parole decisions as required by law,' and the Board acknowledges that the statute requires it to incorporate risk and needs principals into its decision-making process. According to the record, the Board was trained in the use of the COMPAS instrument prior to petitioner's hearing. Moreover, the Board acknowledges that it has used the COMPAS instrument since February 2012 and will use it for petitioner's next appearance. Under these circumstances, we find no justification for the Board's failure to use the COMPAS instrument at petitioner's October 2011 hearing. Accordingly, we agree with petitioner that he is entitled to a new hearing. Given this result, it is unnecessary to address petitioner's remaining contentions."

In the absence of any indication in the record that a TAP and/or COMPAS risk and needs assessment instrument was utilized in connection with petitioner's November 8, 2011 Parole Board appearance and the ensuing parole denial determination, this Court finds the decision of the Appellate Division, Third Department in *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 November 2011 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: August 12, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice