Matter of James v New York State Bd. of Parole
2013 NY Slip Op 33352(U)
December 27, 2013
Sup Ct, St. Lawrence County
Docket Number: 141545
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
DWIGHT JAMES,#84-A-7255,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2013-0428.24
INDEX #141545
ORI # NY044015J

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

- X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Dwight James, verified on June 21, 2013 and filed in the St. Lawrence County Clerk's office on June 26, 2013. Petitioner, who is an inmate at the Cayuga Correctional Facility, is challenging the October/November 2012 decision denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on July 1, 2013. By letter dated August 6, 2013 counsel for the respondent acknowledged that one of the numerous arguments advanced in the petition was meritorious and, therefore, consented that the petition be granted with a *de novo* parole interview to be conducted.[1] Petitioner objected and the Court, by Letter Order dated August 28, 2013, found that "[n]otwithstanding respondent's request for the issuance of an order directing a *de novo* parole interview . . . the issuance of such an order

[1] As set forth in counsel's letter, " . . . Petitioner states that the Board failed to consider the most recent 'Personal Parole Summary' packet he submitted in June 2012. Rather, Petitioner contends that the Board relied on a similar packet, which had been submitted in 2010 for consideration during a prior hearing. The Board has reviewed its files, and it does not have a copy of the 2012 Parole Summary packet. Additionally, the transcript of the October 2012 hearing reflects that the Board was referencing and considering the 2010 packet. Therefore, Respondent consents to granting Petitioner a *de novo* interview to be held as soon as practical . . . "

should await the consideration of other claims advanced in the petition." The respondent was therefore directed to serve answering papers. The Court has since received and reviewed respondent's Answer and Return, including confidential Exhibits B and C, verified on September 20, 2013, as well as petitioner's Reply thereto, dated September 24, 2013 and filed in the St. Lawrence County Clerk's office on September 27, 2013.

On November 14, 1984 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Robbery 3°. The criminal act underlying petitioner's 1984 conviction was committed on October 11, 1983. Petitioner was apparently arrested after this incident but was released on bail following arraignment. On January 23, 1984, while still at liberty on bail, petitioner committed a more serious criminal act and on November 6, 1985 he was sentenced in Supreme Court, New York County, as a second felony offender, to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2°, Robbery 2° and Robbery 1°. Petitioner's 1985 convictions were affirmed on direct appeal. *People v. James*, 75 NY2d 874, *aff'g* 144 AD2d 1042.

After having been denied discretionary parole release on two prior occasions, petitioner made his third appearance before a Parole Board on October 30, 2012. Following that appearance a decision was rendered again denying him discretionary parole release 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 OFFESES [sic] IN MANHATTAN INVOLVED MURDER 2ND, ROBBERY 1ST, ROBBERY 2ND AND ROBBERY 3RD.
>
> YOUR CRIMINAL HISTORY INCLUDES A PRIOR GRAND LARCENY 3RD.
>
> YOUR INSTITUTIONAL PROGRAMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED TO YOUR CREDIT.
>
> YOUR DISCIPLINARY RECORD REFLECTS TWO (2) TIER 3 REPORTS. YOU ARE CURRENTLY IN THE SHU.
>
> 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 document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on January 25, 2013. The Appeals Unit, however, failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

As noted previously, the respondent herein has already consented that the petition be granted with a *de novo* parole interview conducted. This concession was based upon the acknowledgment that petitioner's 2012 Parole Board failed to consider his 2012 parole summary packet. Petitioner's objection notwithstanding, this turn of events potentially supported the immediate issuance of judgment granting the petition and remanding the matter to the Board for a *de novo* interview. *See Hartwell v. Division of Parole,* 57 AD3d 1139. To the extent this Court nevertheless determined that the issuance of such a judgment " . . . should await the consideration of other claims advanced in the petition,"

it was not the Court's intent to address and dispose of every argument advanced in the petition prior to the issuance of the judgment/remand order. Rather, the Court was concerned that if certain discreet, narrowly applicable causes of action were not addressed prior to remand, such causes of action would likely escape judicial review for many months, to the detriment of petitioner. In this Decision and Judgment, therefore, the Court will limit its consideration to petitioner's "other claims" that the COMPAS ReEntry Risk Assessment instrument was ignored by the Parole Board and that no Transitional Accountability Plan (TAP) was prepared for consideration by the Parole Board in determining whether or not petitioner should be released to parole supervision.

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; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department . . . (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.

Citing Executive Law §259-c(4) and (12), petitioner argues that the Parole Board was required to measure his level of rehabilitation and the likelihood of this success upon parole release through " . . . THE UTILIZATION OF A RISK AND NEEDS INSTRUMENT (I.E., COMPAS AND TAP) THAT WOULD BE ADMINISTERED TO ALL INMATES ELIGIBLE FOR PAROLE SUPERVISION." (Emphasis in original). According to petitioner, "THE BOARD TOTALLY IGNORED THE COMPAS OVERALL RISK POTENTIAL, WHICH INDICATED PETITIONER'S OVERALL RISK POTENTIAL WAS '**LOW**' ACROSS ALL CENTRAL CATEGORIES." In addition, petitioner argues that no TAP was prepared/considered in connection with the parole denial determination.

Executive Law §259-c(4) 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 . . ." (Emphasis added).[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 potential issue will not be addressed in this Decision and Judgment.

The Court first notes that as a part of the same legislative enactment (L 2011, ch 62, part C, subpart A) wherein Executive Law §259-c(4) was amended - albeit with a different effective date - the list of factors that must be considered in connection with discretionary parole release decisions was amended/consolidated in Executive Law §259-i(2)(c)(A), as quoted previously in this Decision and Judgment. Although the list of statutory factors set forth in the amended version of Executive Law §259-i(2)(c)(A) does not include reference to any risk and need assessment instrument or risk and need assessment principles, the statute nevertheless mandates consideration of the prospective parolee's " . . . institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates," as well as his/her "release plans including community resources, employment, education and training and support services available . . ." Executive Law §259-i(2)(c)(A)(i) and (iii). Thus, whatever else the import of the amendment to Executive Law §259-c(4), the Parole Board must "incorporate risk and

[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 . . ."

needs principles" in measuring/assessing the mandatory factors set forth in Executive Law §259-i(2)(c)(A).

A Parole Board 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 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).

With respect to the COMPAS ReEntry Risk Assessment instrument prepared in conjunction with the consideration of petitioner for discretionary parole release, it is noted that such instruments scores petitioner as a low risk for felony violence or rearrest. This fact was acknowledged, on the record, by one of the commissioners presiding at petitioner's October 30, 2012 Parole Board interview. Although the Appellate Division, Third Department has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,*____AD3d_____, 2013 NY Slip Op 08189, *Malerba*

v. Evans, 109 AD3d 1067 and *Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in such cases, or the amended statute, to suggest that the quantified risk assessment determined through utilization of a risk and needs assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. In this regard it is noted that the "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Partee v. Evans*, 40 Misc 3d 896. In the case at bar the Parole Board ultimately concluded that a denial of parole was warranted based upon the nature of the crimes underlying petitioner's incarceration as well as his prison disciplinary record.

Turning to the TAP issue, the Court notes that as part of the same legislative enactment (L 2011, ch 62, part C, subpart A) wherein Executive Law §§ 259-c(4) and 259-i(2)(c)(A) were amended, a new Correction Law § 71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

Although Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAP plans with respect to inmates - such as petitioner - already in DOCCS custody prior to the effective date of the statute.

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 or disbursements, but only to the extent that the October/November 2012 parole denial determination is overturned and the matter remanded for *de novo* parole release consideration within 45 days of the date of this Decision and Judgment, in a manner not inconsistent with this Decision and Judgment.

Dated: December 27, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court