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No Obligation Found in New Law to Revamp Parole Procedures

John Caher, New York Law Journal

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ALBANY - An upstate appellate panel held Thursday that the Board of Parole has no obligation to spell out its procedures or provide more than a cursory explanation for its decisions to deny an inmate release.

The ruling dashed the hopes of inmates and activists, who believed that a 2011 amendment to the Executive Law required the parole board to shift its focus from punishment to rehabilitation.

In the first appellate review of the 2011 law, the Appellate Division, Third Department, said that virtually nothing has changed since it held, prior to the amendment, that the parole board "need not enumerate, give equal weight or explicitly discuss every factor considered and was entitled … to place a greater emphasis on the gravity of [the] crime" (see *Matter of Serrano v. Alexander*, 70 AD3d 1099 (2010)).

Inmates and their attorneys were confident that the 2011 legislation, which required the board to incorporate a risk-and-needs analysis into its decision making and formulate "written procedures" was a game changer. With some judges, particularly Supreme Court Justice Richard Mott (See Profile) of Columbia County, it was.

But the Third Department's holding in *Montane v. Evans*, 517567, vindicated the policies and practices of the Board of Parole and allows it to continue functioning essentially as it was before the Legislature changed the law.

"It is a clear indication to me that any change will require legislative initiative," said Orlee Goldfeld of Hollyer Brady, who represented the inmate in the case decided Thursday as well as several other parole-eligible prisoners who were denied release. "The board is certainly not going to make any changes to its processes and unfortunately the court is not going to compel it to change its ways."

Within hours of seeing the decision, Assemblyman Daniel O'Donnell, a Manhattan Democrat who chairs the committee on correction, said he was drafting new legislation to "correct the misreading of the law by the Third Department." O'Donnell said his intention in voting for the 2011 measure was to "get a more objective assessment tool" for the parole board to use in making its determinations.

"I think the decision is wrong on many levels," O'Donnell said. "They said we didn't expect them to draft rules and regulations. Yes, we did. And we expect them to follow the rules and regulations that they draft. If the judges are choosing to interpret our intent so wrongly, we will make our intent specifically clear and state that the regulations are required and the board has to follow them."

Montane centered on provisions in the 2011 law that required the board to consider an inmate's rehabilitation and to adopt written procedures for doing so.

Mott has repeatedly held that a short memo from then parole board chairman Andrea Evans to the commissioners did not constitute a "written procedure."

Additionally, Mott and a handful of other judges have shot down a number of recent parole determinations where the panel denied release after mentioning the statutory criteria in passing and concluding that the convict remains a threat to the public, while offering no support for its conclusion.

Mott and some other judges have repeatedly held that the board must do more under the 2011 amendment than simply list the various factors it is required to consider, assert that it considered them and then deny parole on the basis of a crime that in some instances was committed decades in the past.

But the Third Department unanimously reversed. All four justices agreed that the denial of parole in the *Montane* matter did not evince "irrationality bordering on impropriety," the standard since 2000 (see *Matter of Silmon v. Travis*, 95 NY2d 4700) for reversing a parole determination.

However, one judge, in a concurring opinion, said the paucity of any rationale for its determinations renders the parole board's determinations virtually immune from judicial review.

The case centers on Yotuhel Montane, who is serving a 3-to-9 year sentence for a drug conspiracy. Montane filed an Article 78 petition after he was denied parole.

Mott granted the petition, as he has in several other cases, after concluding that the board had failed to adopt written procedures as required by law, and that it focused almost exclusively on the inmate's crime, giving short shrift to factors such as rehabilitation. Mott has held in several cases that the parole board must, at least to some extent, explain its determinations and cannot merely state that it did all that the law requires.

The Third Department reversed in an opinion by Presiding Justice Karen Peters (See Profile).

Peters said that if the Legislature wanted the parole board to draft formal rules and regulations, it would have said so explicitly, and that the Evans memo fulfilled its obligation under §259-I of the Executive Law. She said the 2011 revision simply added to the various factors the parole board must consider an analysis of the inmate's rehabilitative efforts and likelihood of success.

"While the 2011 amendments now require the Board to ascertain the steps an inmate has taken toward rehabilitation and the likelihood of success upon release and consider them in determining whether parole release should be granted, we cannot conclude that this transformed or otherwise altered the obligations of either the Board in articulating its determinations or this Court in reviewing such determinations," Peters wrote in a footnote in an opinion shared by justices Leslie Stein (See Profile) and William McCarthy (See Profile).

Justice Elizabeth Garry (See Profile) concurred with the result. However, Garry said the 2011 amendments unquestionably required the parole board to consider the prisoner's rehabilitation, and without an explanation of how the board reached its decision, the judiciary is unable to effectively review the board's determinations.

"Meaningful review of the Board's compliance with the statutory directives cannot be accomplished if the Board need not even enunciate the factors that it finds determinative in any given case," Garry wrote. "Our exceptionally deferential precedent allows too much mystery and too little analysis."

Goldfeld said that under Thursday's decision, the parole board is free to "continue making decisions based on whim."

"They are irrational," Goldfeld said of the board's decisions. "They keep people incarcerated longer than necessary. This is costing taxpayers millions of dollars. I don't see any justification for the way they conduct themselves."

A recent report by O'Donnell's committee, suggests that the release rate has actually declined since the 2011 legislation, despite the fact that several lawmakers have said it was intended to have the opposite effect.

According to the report, in fiscal 2010-11, parolees account for less than 5 percent of felony arrests annually and only 8 percent return to prison for a new offense within three years of their release.

Assistant Attorney General Frank Brady represented the parole board. The attorney general's office declined comment, as did the parole board.

@|John Caher can be contacted at jcaher@alm.com. Twitter: @JohnCaher

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