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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5435-12T3

ROLAND GEBERT,

Plaintiff-Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Defendant-Respondent.

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Argued October 7, 2014 – Decided October 23, 2014

Before Judges Koblitz and Haas.

On appeal from the New Jersey State Parole Board.

Eric J. Marcy argued the cause for appellant (Wilentz, Goldman & Spitzer, attorneys; Mr. Marcy, of counsel and on the brief).

Christopher C. Josephson, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, Lisa A. Puglisi, Assistant Attorney General, of counsel; Mr. Josephson on the brief).

PER CURIAM

Petitioner Roland Gebert appeals from the June 19, 2013 decision by respondent New Jersey State Parole Board (the Board) denying him parole and affirming his forty-eight-month Future

Eligibility Term (FET).<sup>1</sup> In 1979, when Gebert was seventeen years old,<sup>2</sup> a jury convicted him of the murder for hire of a teenage girl who was raped and killed in a particularly brutal manner. Two years later a jury convicted Gebert of conspiracy to escape the jail where he had been confined on the murder charge. Gebert was sentenced to two to three years in prison consecutive to the life sentence he received for the murder charge. The Board denied parole for Gebert on six prior occasions. He was fifty-one years old and had served thirty-two years and eight months of his sentence at the time of his most recent parole eligibility. We remand to the Board to consider the materials submitted by Gebert to the Board.

Gebert sought parole "to a transitional parole program prior to being fully paroled to the community[.]" N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 550-51 (App. Div.), certif. denied, 111 N.J. 649 (1988); N.J.A.C. 10A:71-3.11(b)14 (requiring the Board to consider a parole plan when deciding whether to release an inmate). To that end he submitted a packet of material including transitional community programming

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<sup>1</sup> The standard FET for an inmate serving a murder sentence is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1). A longer FET may be imposed if a three-member Board panel finds the inmate has made unsatisfactory progress "in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d).

<sup>2</sup> He turned eighteen three days after the murder.

documents and one recent evaluation by a privately retained expert. Although the Board notified Gebert's counsel that this packet of material would be made a part of Gebert's "parole file[,]" it is not included in the statement of items comprising the record on appeal submitted by the Board.<sup>3</sup> Neither did the Board address any of these documents when explaining its decision.

The Board denied Gebert parole because: (1) he has a prior criminal record; (2) the nature of his criminal record is increasingly more serious; (3) he is currently incarcerated for a multi-crime conviction; (4) prior opportunity on probation has failed to dissuade him from criminal behavior; (5) he has recent institutional infractions; (6) he lacks insight into his criminal behavior; and (7) he still has unresolved substance abuse problems.

The Board noted the following mitigating factors: (1) plaintiff has participated in institutional programs, including programs directly related to behavior; (2) plaintiff has average to above-average institutional reports; (3) plaintiff has made attempts to enroll in programs although he was not ever

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<sup>3</sup> We note that Gebert's confidential appendix contains a handwritten form entitled "Confidential Remarks to Panel" dated August 16, 2012, which informs the panel that this material is available for review.

admitted. In making its decision, the Board put great weight on one particular expert evaluation and Gebert's in-person answers to the Board's questions, which the Board determined showed "that more times is needed for [him] to recognize and address further the root causes of [his] criminal actions."

On appeal, Gebert raises the following issues:

POINT I: THE BOARD IGNORED AND UNDERVALUED SUBSTANTIAL EVIDENCE, RELIED ON THE SAME ERRONEOUS JUSTIFICATION TO DENY PAROLE THAT WAS DETERMINED ARBITRARY IN STATE V. TRANTINO.

POINT II: THE BOARD'S FAILURE TO ASSESS PLAINTIFF'S SUITABILITY FOR PAROLE TO A RESIDENTIAL COMMUNITY PROGRAM IS, BY ITSELF, ARBITRARY.

POINT III: THE PAROLE BOARD FAILED TO PROPERLY CONSIDER PLAINTIFF'S AGE AT THE TIME OF THE CRIME.

POINT IV: PLAINTIFF WAS DENIED DUE PROCESS IN VIOLATION OF THE NEW JERSEY AND UNITED STATES CONSTITUTIONS.

A. FAILURE TO PROPERLY EVALUATE THE DEPARTMENT OF CORRECTION PSYCHOLOGICAL EVALUATIONS THAT SPANNED YEARS.

B. REFUSING TO CONSIDER ADDITIONAL RELEVANT MATERIALS ON AN ADMINISTRATIVE APPEAL TO THE FULL BOARD FROM THE FULL BOARD'S OWN DECISION.

C. THE BOARD'S SEPARATION OF CONSIDERATION ON THE ISSUE OF PAROLE DENIAL FROM THE SETTING OF AN FET RESULTS IN AN UNNECESSARY BIFURCATION THAT CAUSED UNNECESSARY DELAY.

D. THE BOARD FAILED TO PROVIDE ANNUAL PAROLE REVIEWS.

E. THE BOARD'S PRACTICES VIOLATE DUE PROCESS.

The Board has broad power as its "decisions are highly 'individualized discretionary appraisals[,]' " but its power is not unlimited. Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001) (Trantino VI) (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)). In determining whether the Board's final decision was valid, the role of the judiciary focuses on three questions:

(1) whether the agency's action violates express or implied legislative policies, i.e., did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24 (1998) (Trantino IV) (citation omitted).]

The scope of appellate review is narrow and the Board is subject to the same standard as other administrative reviews. Trantino VI, supra, 166 N.J. at 173. We must affirm the administrative action unless it was "'arbitrary, capricious or unreasonable, or not supported by substantial credible evidence

in the record as a whole.'" Warren Hosp. v. N.J. Dep't of Human Servs., Div. of Mental Health Servs., 407 N.J. Super. 598, 610 (App. Div. 2009) (quoting SSI Med. Servs., Inc. v. State, Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 146 N.J. 614, 620 (1996)).

Moreover, we may not substitute our judgment for the fact-finding of an administrative agency. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001) (citation omitted). "'If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself.'" Ibid. (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

The Parole Act of 1979, N.J.S.A. 30:4-123.45 to -123.76, provides that when an inmate is eligible for parole, he shall be released unless a preponderance of the evidence demonstrates that "there is substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.53 (amended 1997). Thus, when an inmate becomes eligible for parole, there is a "presumption in favor of parole[,]" In re Parole Application of Trantino, 89 N.J. 347, 356 (1982) (Trantino II), and the burden

is on "the State to prove that the prisoner is a recidivist and should not be released.'" Trantino VI, supra, 166 N.J. at 197 (quoting N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)). Additionally, "the punitive aspects of a sentence may no longer be considered as an independent ground for denying parole[.]" Trantino II, supra, 89 N.J. at 372. Rather, the seriousness of the crime may be weighed "as an element in determining whether the offender's punishment has been adequate to insure his individual progress toward rehabilitation[.]" insofar as it reflects on his or her likelihood to recidivate. Id. at 373-74.

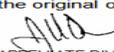
Thus the sole question in determining parole fitness is whether "there is a substantial likelihood that the inmate will commit a crime . . . if released on parole[.]" N.J.S.A. 30:4-123.53 (amended 1997). "Rehabilitation is relevant . . . only as it bears on the likelihood that the inmate will not again resort to crime. It need not be total or full or real rehabilitation in any sense other than there is no likelihood of criminal recidivism." Trantino IV, supra, 154 N.J. at 31.

In determining parole eligibility, the Board must consider the twenty-three non-exclusive factors enumerated in N.J.A.C. 10A:71-3.11(b), including commission of offenses or serious disciplinary infractions while incarcerated; nature and pattern

of previous convictions; facts and circumstances of the offense; participation in institutional programs; statements of institutional staff as to readiness for parole; relationships with institutional staff; changes in attitude; personal strengths and motivations; statements of the inmate, the prosecutor's office, and the victim's family; and the results of objective risk assessment instruments. The Board has an obligation to receive and consider relevant information. N.J.S.A. 30:4-123.55(c); see also Cestari, supra, 224 N.J. Super. at 544 (discussing that pursuant to N.J.S.A. 30:4-123.55(c) a Board panel at a parole hearing must "'receive as evidence any relevant and reliable documents'"). It may not rely on selective portions of the record that support its determination of likely recidivism while overlooking or undervaluing conflicting information. Trantino VI, supra, 166 N.J. at 189-90.

Because the record does not reflect that the Board reviewed Gebert's extensive submission, we cannot find that it reviewed the entire relevant record. We therefore remand for reconsideration after such a review.

Reversed and remanded to the Board for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.  
  
CLERK OF THE APPELLATE DIVISION