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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4659-15T4

JACINTO KOGER-HIGHTOWER,

Appellant,

v.

NEW JERSEY STATE PAROLE
BOARD,

Respondent.

Submitted November 6, 2017 – Decided April 17, 2018

Before Judges Messano and O'Connor.

On appeal from the New Jersey State Parole
Board.

Jacinto Koger-Hightower, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Melissa H. Raksa,
Assistant Attorney General, of counsel;
Christopher C. Josephson, Deputy Attorney
General, on the brief).

PER CURIAM

Appellant Jacinto Koger-Hightower appeals from the July 27,
2016 final decision of the New Jersey State Parole Board
(Board). The final decision affirmed the Board's two-member

panel's decision denying parole and referring the matter to the Board's three-member panel to establish a future eligibility term (FET). The final decision also affirmed the three-member panel's decision establishing a 200-hundred month (16.66 years) FET. We affirm the denial of parole, but reverse the imposition of the 200-month FET and remand for a new FET determination.

I

In 1986, appellant was convicted by jury of first-degree murder, N.J.S.A. 2C:11-3(a)(3); first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). Following a trial on the penalty-phase, on November 10, 1986, the jury sentenced appellant to death on the murder charge. On June 4, 1987, he was sentenced to an aggregate term of thirty-five years on the remaining charges.

On July 12, 1990, the New Jersey Supreme Court overturned appellant's death sentence and remanded the matter for a new penalty-phase trial, because the trial court had erroneously instructed the jury that unanimity was required to find mitigating factors. State v. Hightower, 120 N.J. 378, 386 (1990). The second jury also sentenced appellant to death. On August 8, 1996, the Supreme Court again reversed the death

sentence, because the trial court improperly removed a juror during deliberations. State v. Hightower, 146 N.J. 239, 255-56 (1996). The third trial on the penalty-phase resulted in a hung jury. On March 21, 2002, appellant was sentenced in the aggregate to life in prison with a thirty-year period of parole ineligibility. He became eligible for parole for the first time on August 19, 2015.

Appellant's convictions arose out of the following facts. In July 1985, appellant, then twenty-one years of age, pointed a gun at a store clerk in a convenience store and demanded she open the cash register. When she refused, appellant shot her in the chest. She continued to refuse to open the register, so he shot her in the neck. She fell to the floor and when he felt her grab his leg, he shot her in the head. He then dragged her into the freezer and left the store. The victim died later that day of the gunshot wounds.

In 2015, appellant participated in a parole hearing before a two-member panel. Because of appellant's lack of progress in reducing the likelihood he would engage in criminal activity if released, the panel denied appellant parole and referred the matter to a three-member panel to consider the imposition of a FET outside the standard twenty-seven months. See N.J.A.C.

10A:71-3.21(a)(1). The three-member panel imposed a 200-month FET, issuing a seven-page written explanation of its decision.

In its decision, the three-member panel noted it had listened to appellant's testimony before the two-member panel. The three-member panel commented upon the two-member panel's efforts to ascertain whether appellant had any insight into why he committed the murder, so the two-member panel could assess whether there was a substantial likelihood appellant would commit another crime if released.

The three-member panel reported that, when asked by the two-member panel why he committed the murder, appellant's response was he needed money and, in an act of desperation, decided to commit the robbery. Then, after pointing the gun at the clerk and seeing a look of fear in her face, he "became afraid" and "wanted to leave." However, instead of leaving, he closed his eyes and "just started pulling the trigger." Appellant did not provide any explanation for why he pulled the trigger. He also stated he committed the crime to show his wife, who planned to divorce appellant, that their marriage was worth saving. He did not provide the basis for his belief committing this crime would salvage the marriage.

The three-member panel found:

[A]fter three (3) decades of incarceration you do not recognize nor do you acknowledge the fact that beyond the instability of your failing marriage affecting you as you claim, why you were impelled to react to that situation by committing the extreme and violent murder of a stranger. The Board panel notes that familial, monetary and societal issues affect individuals on a daily basis, but the stressors that you claim fell upon you, led you to commit murder. This aspect to the perceived realizations you related to the [two-member] Board panel has not yet been explored by you. Beyond recognizing a specific traumatic event that possibly led to the underlying motivations to your decision to commit the murder, the Board panel believes that you must come to understand why you reacted and behaved in the crime-specific manner that you did.

Because of appellant's failure to get to the root of what caused his criminal conduct, the panel determined the standard eligibility term of twenty-seven months was too limited a period to enable appellant to determine what motivated him to commit the act of murder. Therefore, the three-member panel imposed a FET of 200 months. The three-member panel also put some weight on the fact appellant minimized and failed to accept responsibility for the institutional infractions he committed, further exhibiting an unwillingness or inability to engage in any "substantive introspection" into past criminal conduct. But his failure to gain any insight into why he committed the murder was the panel's principal reason for imposing the subject FET.

Appellant administratively appealed the panels' decisions, but on July 27, 2016, the full State Parole Board affirmed both. The Board concurred with the two-member panel's determination appellant lacked insight into why he engaged in criminal conduct and that there was a substantial likelihood he would commit a crime if released on parole. The Board agreed a FET of only twenty-seven months was inappropriate due to appellant's lack of progress in eliminating the likelihood of recidivism, and approved the FET of 200-months.

II

On appeal, appellant contends: (1) the Board failed to consider material facts; (2) the Board failed to document the evidence that demonstrates there is a substantial likelihood appellant will commit a crime if released on parole; (3) a Board member was prejudiced against appellant; and (4) the two-member panel failed to comply with the Board's professional code of conduct. With one exception, we reject these arguments, which are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

A Board's decision to grant or deny parole for crimes committed before August 1997 turns on whether there is a "substantial likelihood" the inmate will commit another crime if released. N.J.S.A. 30:4-123.53(a) (1979), amended by L. 1997,

c. 213, § 1; N.J.S.A. 30:4-123.56(c) (1979), amended by L. 1997, c. 213, § 2; Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000); N.J.A.C. 10A:71-3.10(a). Our standard of review of Board decisions is limited and "grounded in strong public policy concerns and practical realities." Trantino v. N.J. State Parole Bd., 166 N.J. 113, 200 (2001) (Baime, J., dissenting). "To a greater degree than is the case with other administrative agencies, the Parole Board's decision-making function involves individualized discretionary appraisals." Id. at 201 (Baime, J., dissenting) (citing Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 358-59 (1973)).

Our courts "may overturn the Parole Board's decisions only if they are arbitrary and capricious." Ibid. With respect to the Board's factual findings, we do not disturb them if they "could reasonably have been reached on sufficient credible evidence in the whole record." Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179 (App. Div. 2004) (quoting Trantino, 166 N.J. at 172). We accord such deference because "[t]he decision of a parole board involves 'discretionary assessment[s] of a multiplicity of imponderables'" Trantino, 166 N.J. at 201 (second alteration in original) (Baime, J., dissenting) (citing Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 10 (1979)).

Having reviewed the record in light of these legal principles, we affirm the Board's denial of parole. Appellant's parole eligibility was evaluated by the full Board in a comprehensive written decision. The Board accepted and adopted the determination made by the two-member panel appellant lacked insight into why he committed the murder and presented "a substantial likelihood that [he] will commit a crime . . . if released on parole." See N.J.S.A. 30:4-123.53(a) (1979). There is sufficient credible evidence in the record supporting these findings, and we discern nothing arbitrary or capricious in the Board's decision to deny parole.

After denying parole the Board must establish a FET. N.J.A.C. 10A:71-3.18(a)(2). When the Board denies parole for an inmate serving a life sentence, the standard eligibility term is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1). The Board, however, may exceed the FET if it determines the presumption of twenty-seven months is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d).

Here, there was substantial credible evidence in the record for the Board to conclude the presumptive twenty-seven-month FET was inappropriate in light of appellant's lack of insight into

why he committed the murder, warranting a departure from the FET guidelines. However, the Board did not articulate why a FET seven times the presumptive FET was necessary. "While we must defer to the agency's expertise, we need not surrender to it." N.J. Chapter of the Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Env'tl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990). This is particularly true when the agency fails "to address critical issues, or to analyze the evidence in light of those issues." Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 415 (App. Div. 2004). "[W]e insist that the agency disclose its reasons for any decision, even those based upon expertise, so that a proper, searching, and careful review by this court may be undertaken." Balaqun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 203 (App. Div. 2003). An explanation of the agency's reasoning is necessary because it is "[o]ne of the best procedural protections against arbitrary exercise of discretionary power." Monks v. N.J. State Parole Bd., 58 N.J. 238, 245 (1971) (quoting Davis, Administrative Law § 16.12 (1970 Supp.)). Thus, a decision without an explanation as to how the agency reached its result is arbitrary and capricious. See Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 376 (App. Div. 2016).

Here, the Board did not articulate why appellant's lack of insight into what caused him to commit an act of murder will require another sixteen years of rehabilitation. Without explanation for the Board's approval of such a lengthy FET, we cannot evaluate the propriety of the Board's decision. Accordingly, the Board's failure to explain its reasoning renders the Board's decision arbitrary and capricious. We therefore vacate the 200-month FET, and remand this matter to the Board to reconsider the FET and fully explain any FET selected on remand.

Affirmed in part; reversed and remanded in part. 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