STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of ANTHONY BOTTOM,

Petitioner,

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

-against-

DEPARTMENT OF CORRECTIONAL SERVICES AND COMMUNITY SUPERVISION, BOARD OF PAROLE,
Respondent.

JUDGMENT
Index No.: 902448-17
RJI No.: 01-17-ST8666

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:

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By: Lynn Knapp Blake, Assistant Attorney General, of Counsel
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HON. W. BROOKS DeBOW, Acting Justice:

Petitioner has commenced this proceeding pursuant to CPLR article 78, seeking review of respondent's denial of parole release following petitioner's eighth appearance before a panel of the Board of Parole ("Board"). Petitioner is serving two concurrent terms of incarceration of 25 years to life, imposed upon his conviction of two counts of murder in the first degree for his active participation in the murder of two New York City Police Officers on May 21, 1971. By decision and order dated November 2, 2017, the Court found no merit in all but one of petitioner's contentions,

and reserved and held in abeyance its final decision and judgment pending respondent's submission for in camera review the letters or other documents evidencing community opposition that were submitted to and considered by the panel in rendering its June 2016 determination to deny petitioner parole release (see Matter of Bottom v Dept. of Corr. and Community Services, Bd. of Parole, Sup Ct, Albany County, Nov. 2, 2017, DeBow, AJSC., Index No. 902448/17). These documents were necessary to complete the administrative record to allow the Court to fully consider petitioner's contention "that the Board's consideration of letters in opposition from individuals affiliated with the PBA [Police Benevolent Association] was improper inasmuch as those individuals did not know petitioner and his efforts at rehabilitation and that they opposed his release solely on the ground that he had killed a police officer" (id.), particularly in light of the Board's statement in its written decision that " '[t]here is significant community opposition to [petitioner's] release' (Answer, Exhibit I)." Respondent has transmitted, and the Court has reviewed, a box of letters in opposition to petitioner's release, along with the affidavit of Sara M. Spink, a Supervising Offender Rehabilitation Coordinator, who was present at petitioner's parole interview via video conference and who averred that the confidential file for petitioner was presented to the panel that denied parole release in 2016 (see 11/21/17 Knapp Blake Correspondence, with Enclosures [Citizen Submissions and Spink Affidavit]).

As noted in the Court's prior decision and order,

> "the Board may not consider certain factors that are outside the scope of Executive Law § 259-i (2)(c)(A) such as 'penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society' (Matter of King v New York State Div. of Parole, 83 NY 2d 788, 791 [1994]), and a non-individualized objection to the parole release of an individual because his or her crime falls within a class of crimes would appear to be improper."

(Matter of Bottom v Dept. of Corr. and Community Services, Bd. of Parole, Sup Ct, Albany County, Nov. 2, 2017, DeBow, AJSC., Index No. 902448/17, at p.11). Thus, remaining for judicial review are the questions of whether the material in the box addressed factors beyond those permitted by Executive Law § 259-i (2) (c) (A), and if so, whether the Board's consideration of that material requires reversal of its determination to deny petitioner parole release.

The confidential file presented to the panel for petitioner's June 2016 reappearance includes letters and emails in opposition to petitioner's release from private citizens, public officials and police organizations dating back to 1995. The most recent letters and e-mails are dated just prior to petitioner's June 2016 reappearance before the Board, and they refer to the nature and seriousness of petitioner's crime and petitioner's criminal history in California, the emotional anguish that the parole hearing causes the friends, families and colleagues of the deceased officers, petitioner's apparent lack of remorse, and public safety in urging denial of parole. Communications in opposition that were submitted for reappearances before the Board prior to 2016 cite the nature and seriousness of petitioner's crimes and his lack of remorse or responsibility for his crimes, and a very small percentage of these communications urge denial of parole release because petitioner is a murderer of police officers, or they espouse the belief that those who murder police officers should be subjected to the death penalty or life imprisonment without the possibility of parole.

As an initial matter, the Spink affidavit that was submitted with the confidential file avers only that the file was presented to the Board panel in 2016, and not that any or all members of the panel personally reviewed and considered the material in the file. Assuming, however, that each member of the panel read and considered every single letter in opposition to petitioner's release, their

having done so does not, in the circumstances presented, warrant reversal of the Board's determination.

In large and overwhelming measure, the communications in the file address matters that the Board is expressly permitted to consider under Executive Law § 259-i (2) (c) (A), such as the seriousness of petitioner's offense, his prior criminal record, and the threat to the welfare of society if he were to be released. Some of the communications that pre-date petitioner's 2016 reappearance before the Board contain some matters that the Board was not permitted to consider, such as urging denial because of petitioner's status as a "cop killer" or stating the belief that cop killers should be subjected to the death penalty or life without parole. However, the mere fact that a small number of the communications contain such inappropriate matter would "not require the Board to expressly disavow in its decision [those] inappropriate matters . . . or to somehow quantify the extent or degree to which it considered appropriate parts . . . while disregarding other parts in its overall analysis of statutory factors" (Duffy v New York State Dept. of Corr. and Community Services., 132 AD3d 1207, 1209 [3d Dept 2015]). Thus, even if inappropriate material was considered, the Court must review and determine whether the Board "was influenced by, placed weight upon or relied upon any inappropriate matter" (id.). In other words, the mere presence in the confidential file of those communications – even if reviewed by the panel – does not mandate reversal of the denial of parole where, as here, the record does not indicate that the Board placed weight upon, relied upon, or was influenced by community members' assertions that parole should be denied solely because the petitioner's victims were police officers. Thus, petitioner has not demonstrated that the Board's reference to community opposition to his release reflected its consideration of impermissible or inappropriate commentary or that its determination to deny parole was based thereon.

Accordingly, and with incorporation of this Court's prior decision and order dated November 2, 2017, it is

ORDERED, that the petition is DENIED.

This constitutes the judgment of the Court. The original judgment is returned to the attorney for respondent. A copy of the judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this judgment, and delivery of a copy of the judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: Saratoga Springs, New York
January 10, 2018

W. Brooks DeBow
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated April 10, 2017;
2. Verified Petition, April 10, 2017, with Exhibits 1-9;
3. Petitioner's Memorandum of Law in Support of petition, dated April 10, 2017;
4. Verified Answer, dated June 9, 2017, with Exhibits A-M (including Exhibits B, D F and M, submitted for in camera review only);
5. Respondent's Memorandum of Law, dated June 9, 2017;
6. Petitioner's Reply Memorandum of Law, dated June 15, 2017, with Exhibit 1;
7. Correspondence of Lynn Knapp Blake, AAG, dated November 21, 2017, with Enclosures (Affidavit of Sara M. Spink, sworn to November 16, 2017, and In Camera Communications in Opposition to Petitioner's Parole).