January 2020

Administrative Appeal Decision - Clark, Judith

STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: Judith Clark **Facility:** Bedford Hills Correctional Facility

NYSID No.: 04792405Q **Appeal Control #:** 05-039-17B

Dept. DIN#: 83-G-0313

Appearances:
For the Board: The Appeals Unit

For Appellant: Steven Zeidman
CUNY School of Law
2 Court Square
Long Island City, New York 11101

Board Member(s) who participated in appealed from decision: **Stanford, Ludlow, Thompson**

Decision appealed from: 4/2017 Denial of Discretionary Release with a 24-Month Hold.

Pleadings considered: Brief on behalf of the appellant received on August 2, 2017
Supplemental Brief on behalf of Appellant received on September 20, 2017
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript, Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

Commissioner ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

Commissioner ___ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

Commissioner ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

If the Final Determination is at variance with findings and recommendation of Appeals Unit, the written reasons for such determination shall be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and separate findings of the Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 11-29-17.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File

P-2002(B) (5/2011)

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STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the April 2017 Board of Parole ("Board") decision to deny release to parole, contending that: (1) the Board's denial was unlawful, arbitrary and capricious because the Board relied on Appellant's crime without meaningful consideration of her growth and other factors; (2) the decision fails to provide adequate details; (3) the Board was biased and its decision was predetermined; (4) the Board improperly relied on victim statements at sentencing as well as undisclosed statements from individuals not identified in Executive Law § 259-i(2)(c); (5) the Board failed to comply with the 2011 Amendments to the Executive Law, or new amendments to its parole regulations, in that the statutes are now present and rehabilitation based; (6) the Board usurped the roles of the Court and the Governor by effectively resentencing Appellant to a life term; and (7) the Board improperly delayed production and withheld records in violation of Appellant's due process rights.

As an initial matter, parole release decisions are performed under the auspices of Section 259-c(1) of the Executive Law, which grants the Board "the power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole . . . ." In delineating the Board's consideration, Section 259-i provides that:

> 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 law.

Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Therefore, if the Board concludes that any one of the three considerations set forth in Section 259-i(2)(c)(A) has not been met, it is empowered to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

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In making this determination, Section 259-i(2)(c)(A) requires the Board to consider certain factors:

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;

(ii) performance, if any, as a participant in a temporary release program;

(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 and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;

(v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;

(vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;

(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 pre-sentence 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.

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While the consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon, 95 N.Y.2d 470 at 477, 718 N.Y.S.2d at 708. Thus, it is well settled that the weight to be accorded each of the requisite factors is within the Board's discretion. See, e.g., Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). The Board need not explicitly refer to each and every factor, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of Phillips, 41 A.D.3d at 21, 834 N.Y.S.2d at 124. In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

The record as a whole, including the interview transcript and decision, reflects that the Board considered the appropriate factors, including: Appellant's criminal history in Illinois; the instant offenses stemming from the Brink's robbery; Appellant's militant, unapologetic stance at trial and the sentence imposed; official statements; Appellant's institutional record including a Tier III ticket for conspiracy to escape, significant positive programming and educational achievements; and release plans to work while residing with a former associate. The Board also considered Appellant's case plan, the favorable COMPAS instrument, clemency records, Appellant's parole advocacy materials, and letters of support and in opposition of release. In so doing, the Board considered her evolution from an activist to a "blinded revolutionary" who was "at war with America" to an individual who "believes deeply in non-violence and respect for the law."

Consequently, as the record reflects ample consideration of the required factors, including significant discussion of Appellant's rehabilitative accomplishments, the Board was well within its discretion to find that release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). Although the Board was clearly impressed with Appellant's rehabilitative progress, her achievements did not prevent her release from being incompatible with the welfare of society and undermining respect for the law by deprecating the severity of her offense. In reaching that conclusion, the Board permissibly relied on Appellant's criminal history in Illinois; the instant offenses committed as a revolutionary and her statements and behavior during trial; Appellant's continued correspondence with fugitives and SHU time for sharing information about the facility to break her out; and the crime's impact on the victims' families and statements, including by the

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District Attorney, the court and other affected parties, which reflect Appellant still is viewed as a symbol of violent and terroristic crime. Executive Law § 259-i(2)(c)(A); Matter of Rodriguez v. Evans, 102 A.D.3d 1049, 958 N.Y.S.2d 529 (3d Dept. 2013); Matter of Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). Thus, the Board acted within its discretion in determining these considerations outweighed Appellant's positive postconviction activities and rendered discretionary release inappropriate at this time. See generally Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 128-29, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881. Contrary to Appellant's contention, the parole status of some co-defendants does not render the decision arbitrary and capricious as each application for parole release is to be considered on its own individual merits. Baker v. McCall, 543 F. Supp. 498, 501 (S.D.N.Y. 1981), aff'd, 697 F.2d 287 (2d Cir. 1982); Matter of Phillips, 41 A.D.3d at 22, 834 N.Y.S.2d at 124-25.

As the Board's decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole, it satisfied the criteria set out in the Executive Law. Executive Law § 259-i(2)(a); Matter of Kozlowski, 108 A.D.3d 435, 968 N.Y.S.2d 87; Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881. There is no evidence that the Board's decision was predetermined or that the Board was biased. Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000); Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept.), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000). Insofar as Appellant questions the impartiality and integrity of her interview panel, it should be noted that there is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders (see People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992)) and the Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations (see Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000)), neither of which have been overcome by Appellant's allegations, which simply amount to a challenge to the weight accorded by the Board to the factors it was required to consider. That the Board denied parole does not amount to bias. See Matter of Garcia, 239 A.D.2d at 240, 657 N.Y.S.2d 415. Appellant's contention that the Board "summarily rejected" her application for discretionary release on parole is contradicted by the record, which reveals the relevant factors were carefully considered during an interview that spanned two days and a decision-making process that continued during the authorized

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two-week period, culminating in a highly detailed decision issued two weeks after the interview's completion. The transcript does not support Appellant's apparent contention that the parole interview was conducted improperly or that she was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). Similarly, that the Board devoted as much attention to the instant offense (see Executive Law § 259-i(2)(c)(A)(vii)) and the impact upon the victims (see Executive Law § 259-i(2)(c)(A)(v)) as it did to what Appellant believes to be "far more relevant factors", such as her achievements, is permissible and entirely consistent with the Board's obligations under the Executive Law. The Board also committed no impropriety by characterizing the crime as horrendous. See Matter of Betancourt, 148 A.D.3d 1497, 49 N.Y.S.3d 315; Matter of Garcia, 239 A.D.2d at 239-40, 657 N.Y.S.2d at 418.

Although Appellant challenges the propriety of the Board's consideration of statements made at the time of sentencing, the Board committed no error by doing so. Executive Law § 259-i(2)(c)(A); Matter of Copeland v. New York State Bd. of Parole, 2017 NY Slip Op 07376, 2017 N.Y. App. Div. LEXIS 7382 (3d Dept. Oct. 19, 2017); Matter of Williams v. New York State Div. of Parole, 114 A.D. 992, 979 N.Y.S.2d 868 (3d Dept. 2014); Matter of Standley v. New York State Div. of Parole, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006). There is no support for Appellant's implicit contention that the Board can disregard the mandate of Executive Law § 259-i(2)(c)(A) to consider the recommendations of the sentencing court and victim impact statements. Moreover, as with other factors, the weight assigned to victim impact and official statements is within the Board's discretion. See People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

As for Appellant's contention that the Board's decision improperly relied on community opposition, i.e., statements made by members of the public expressing opposition to release, the Board may receive and consider statements submitted by individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. See Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005); see also Matter of Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dept. 1982) (letters from private citizens are protected and

remain confidential). The same has also long been recognized as true with respect to statements supporting an inmate's potential parole release. See, e.g., Matter of Hamilton, 119 A.D.3d at 1273, 990 N.Y.S.2d at 719; Matter of Cardenales v. Dennison, 37 A.D.3d 371, 830 N.Y.S.2d 152 (1st Dept. 2007); Matter of Torres, 300 A.D.2d at 129, 750 N.Y.S.2d at 760. In this regard, we note that Appellant submitted, and the Board considered, a wide range of material in support of her release by individuals not identified in section 259-i(2)(c) of the Executive Law. Indeed, 9 N.Y.C.R.R. § 8000.5(c)(2) restricts access to letters either in support of or in opposition to an inmate's release.

Appellant's contention that the Board failed to comply with the 2011 amendments to the Executive Law is likewise without merit. The 2011 amendments require the Board to incorporate risk and needs principles to "assist" the Board in measuring an inmate's rehabilitation and likelihood of success upon release. Executive Law § 259-c(4). Notably, the 2011 amendments did not change (or limit) the three substantive standards that the Board is required to apply when deciding whether to grant parole, namely (1) whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law"; (2) whether release "is not incompatible with the welfare of society"; and (3) whether release "will not so deprecate the seriousness of his crime as to undermine respect for law." Executive Law § 259-i(2)(c)(A). Here, as previously noted, the Board properly found that release would be incompatible with the welfare of society and would undermine respect for the law by deprecating the severity of the offense. Even uniformly low risk assessment scores and other evidence of rehabilitation would not resolve the broader questions of society's welfare, public perceptions of the seriousness of a crime, or whether release would undermine respect for the law. Thus, the COMPAS instrument cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017). This is exactly what occurred here. Moreover, while the Board's determination denying Appellant's release on parole was governed by the former version of the regulations, even were the recently amended regulations to apply we note that the Board's decision fully complies with their requirements.

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Appellant's assertion that the denial of parole release amounted to an improper resentencing based on penal philosophy also is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). The Board is vested with discretion to determine whether release is appropriate notwithstanding the minimum period of incarceration set by the Court, which, in this case, was 75 years. See Executive Law § 259-c(1); Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007). The appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). Nor did the Board usurp the Governor's role. Where the Governor's commutation reduces the minimum sentence, "[t]the power of the Board of Parole to grant or withhold parole for the duration of the maximum sentence [is] not affected in any way." Matter of Bitz v. Canavan, 257 A.D. 247, 249, 12 N.Y.S.2d 862, 864 (1st Dept.), aff'd 281 N.Y. 699 (1939). Thus, the Board acted within its discretion to hold Appellant for another 24 months after which she will have the opportunity to reappear before the Board.

In response to Appellant's complaints about record access, the matter is beyond the scope of this administrative appeal process. 9 NYCRR § 8006.3. While Appellant conflates the Board (and its counsel) with DOCCS (and its counsel), record requests and related appeals are – and were – properly directed to DOCCS. See 7 NYCRR § 5.45. Insofar as Appellant argues she is entitled to a *de novo* interview because she disputes the partial denial of her requests for records by DOCCS under FOIL, Appellant was informed she could request an extension of time to perfect this appeal pursuant to 9 NYCRR § 8006.2(a) and instead chose to proceed without first resolving her FOIL claims. This is not a basis to challenge the Board's decision under 9 NYCRR § 8006.3.

However, it may be noted that record access is not absolute. An inmate has no constitutional right to the information in her parole file, Billiteri v. U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976), and is not entitled to confidential material, Matter of Justice v. Comm'r of New York State Dep't of Corr. & Cmty. Supervision, 130 A.D.3d 1342, 15 N.Y.S.3d 853 (3d Dept. 2015); Matter of Perez v. New York State Div. of Parole, 294 A.D.2d 726, 741 N.Y.S.2d 753 (3d Dept. 2002); Matter of Macklin v. Travis, 274 A.D.2d 821, 711 N.Y.S.2d 915, 916 (3d Dept. 2000). As Section 8000.5(2) of Title 9 NYCRR limits access to records

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considered by the Board on multiple grounds, including that they were provided under a promise of confidentiality, this includes letters from private citizens. See Matter of Jordan, 86 A.D.2d 725, 447 N.Y.S.2d 44.

Recommendation:

It is the recommendation of the Appeals Unit that the Board's decision be affirmed.