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**ADMINISTRATIVE APPEAL OF
NEW YORK STATE PAROLE DECISION FOR**

██████████ ██████████

NYSID: ██████████

DIN: ██████████

AC# ██████████

Parole Interview Date: September 7, 2021

Denial Date: September 23, 2021

Parole Hearing Location: Eastern Correctional Facility

Parole Panel Location: Albany New York

Notice of Appeal Filed: September 23, 2021

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Submitted on Jan. 11, 2022 to:

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INTRODUCTION

This is an administrative appeal brought pursuant to Executive Law 259-i(4)(b) from a Decision of the State of New York Department of Corrections and Community Supervision in the matter of ██████████ ██████████ dated on or about September 23, 2021 denying Appellant release to parole supervision and holding him 12 months before further release consideration.

Mr. ██████████ is 71 years old and has been incarcerated for over 34 years. The denial being appealed here is his ninth.

Mr. ██████████, sentenced to 25 years to life after conviction of Murder 2d, earned a Limited Time Credit Allowance.

ARGUMENT

I. The Board Failed to Explain How the Statutory Factors Were Considered and Failed to Explain the Reason for Denial in Detail

The Board's decision to deny Mr. ██████████'s release to the community was not grounded in adequate explanation, impermissibly using conclusory statements and boilerplate language. Executive Law 259-i(2)(a) states that "if parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." Further, the Parole Board Regulations were specifically revised in 2017 to state that "reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case." 9 NYCRR 8002.3

In V. Sullivan v. NYS Bd of Parole, a court ruled that where the “Board’s conclusions... merely track the statutory language, without explanation or context,” the court could not “evaluate their rationality.” V. Sullivan v. NYS Bd of Parole, 100865/18 (Sup. Ct., NY Cnty, 2019). Written decisions of the Parole Board may not merely “render a conclusory decision parroting the statutory standard.” Coaxum v. N.Y. State Bd. of Parole, 14 Misc.3d 661 (Sup. Ct. Bronx Cty. 2006); see also Ruzas v. New York State Board of Parole, No. 1456/2016, Slip Op. at 4 (Sup. Ct. Dutchess Cty. Oct. 18, 2017) (holding the Board in contempt for conducting defective de novo interview after the Court set aside the initial decision because “the Board summarily denied [petitioner’s] application without any explanation other than by reiterating the laundry list of statutory factors. The minimal attention, barely lip service, given to these factors and to the COMPAS Assessment cannot be justified given the amount of time already served.”) Courts have also found that mere criteria recitation, coupled with a focus only on the nature of the offense, was insufficient. In Weinstein v. Dennison, the court ruled that “the Board is required to do more than merely mouth the statutory criteria, particularly whereas here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release.” Weinstein v. Dennison, 7 Misc. 3d 1009A (Sup. Ct. NY Cnty, 2005).

Here, the Board claims that it considered the requisite statutory factors and lists examples but does not explain how they were considered. Ex. 1 at 47. Instead of providing due consideration to each statutory factor, the Board focuses on the crime itself. Id. at 48. Throughout the interview, the Board accords more time to asking about the situation with Appellant’s motorcycle (Id. at 4-5); whether Appellant was abusive to his wife (Id. at 15-16); whether Appellant stalked his wife, despite living in a different state prior to the incident (Id. at 16); and Appellant’s estrangement

with his now-adult daughter (Id. at 21-22). The Board's parroting of statutory language and usage of conclusory statements entitles the Appellant to a de novo review.

II. Board Failed to Explain Its Departure from Mr. ██████'s Low Risk COMPAS Scores.

To avoid its obligation to explain departure from Mr. ██████'s low COMPAS risk scores, the Board claimed it was not departing from such scores. Ex. 1 at 48. Yet, the Board did depart from the low scores by determining that release “would be incompatible with welfare of society and would so deprecate the serious nature of [his] crime as to undermine respect for the law” because it is enough that the denial contradicts or is inconsistent with low COMPAS scores. See Phillips v. Stanford (Sup. Ct. Dutchess Cnty. 2019) (finding low COMPAS risk and needs scores “directly contradicted” the Board’s finding that discretionary release would not be incompatible with the welfare of society, and thus the Board was “required to articulate with specificity the particular scores in petitioner’s COMPAS assessment from which it was departing and provide an individualized reason for such departures”); Miranda v. N.Y. State Parole Bd. (Sup. Ct. N.Y. Cnty. 2020) (finding that the Board “needs to explain, with particularity, its reasons for departing from a risk-assessment analysis” when the Board denied parole despite low risk COMPAS scores); Hill v. New York State Bd. Of Parole (Sup. Ct. N.Y. Cnty. 2020) (holding that the Board’s denial, which did not include the word “depart,” nor acknowledge departure from low COMPAS scores, required the Board to “articulate the reasons for this determination with respect to Mr. Hill's low COMPAS Risks and Needs Assessment scores or to ‘provide an individualized reason for this departure,’ in accordance with 9 NYCRR 8002.2”); Voii v. Stanford (Sup. Ct. Dutchess Cnty. 2020) (rejecting as “flawed” the Board’s argument that it need not explain its departure because it did not depart from a finding that the petitioner was likely to reoffend, only that petitioner’s release was incompatible with the welfare of society and would deprecate the seriousness of the offense,

and reiterating that the law “clearly indicates that a departure requires the Board to identify any scale from which it departs and provide an individualized reason” for the departure). Thus, the basis for the Board’s denial is a departure from the low risk COMPAS scores.

When a parole denial departs from low COMPAS scores, the rationale for doing so must be explained. 9 NYCRR 8002.2(a) (“If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.”). Here, to the extent the Board provided any explanation, it is irrational.

██████████ the denial decision claimed that “said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor loath lessons of horrific long-term impact upon the small ██████████ community.” Ex. 1 at 48. The nature of the crime does not rationally explain a departure from low scores. See Voii v. Stanford (Sup. Ct. Dutchess Cnty. 2020). In Voii, all the COMPAS scores were low, yet the Board denied parole finding that release would be incompatible with the welfare of society and would deprecate the seriousness of the crime so as to undermine respect for the law. Id. at 4–5. The Voii court held that the Board’s reason for departure, which was the nature of the crime, was “unrelated to any score contained in the COMPAS assessment,” and held that “judicial intervention is warranted because this departure from the regulations evinces irrationality bordering on impropriety.” Id. at 6–7.

The Board’s failure to rationally explain its departure from Mr. ██████████’s low risk scores requires a *de novo* review. See Voii at 2; Robinson at 2.

III. The Board Inappropriately Infused the Interview with Its Own Opinions and Speculations.

The Board may not make a parole determination based on its own opinion or speculation. Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 51 Misc. 3d 1218(A) (N.Y. Sup. Ct. 2015), aff'd as modified, 140 A.D.3d 34 (2016) (“This Court has been unable to find any statutory or case law that authorizes parole board commissioners to infuse their own personal opinions or speculations into the parole interview or process. [...] There is no additional rational, other than the board's opinion of the heinous nature of the instant offense, and personal beliefs and speculations, to justify the denial of parole release”).

During the interview, the Board made unfounded allegations ██████████ Board repeatedly ██████████ the victim. Ex. 1 at 16; 24-25. However, Mr. ██████████ was never charged with or convicted of stalking. The Board also accused Mr. ██████████ of being “abusive” prior to the incident, another concocted accusation which does not appear in the record. Ex. 1 at 15-17. In addition, throughout the interview the Board pursued inappropriate and irrelevant lines of questioning, such as asking Mr. ██████████ to explain why the victim and the victim’s mother engaged in particular actions (Ex. 1 at 7:17; 13:10-14); implying that Mr. ██████████ was “controlling” over his children and engaging in three pages of questioning over whether Mr. ██████████ ever asked his then six year old daughter whether she thought he was controlling (Ex. 1 at 20-22); and asking Mr. ██████████ about a history of drug abuse, which he does not have (Ex. 1 at 30-31). The Board’s pursuit of these matters indicates that it inappropriately engaged in speculation during the interview and based its decision on the same.

IV. The Board Failed to Genuinely Consider Mr. ██████████’s Institutional Record.

The Board is required to consider the institutional record in making a parole determination. In re Winchell, 32 Misc. 3d 1217(A), 934 N.Y.S.2d 37 (Sup. Ct. 2011) (“The mere mention that

petitioner did participate in rehabilitative progress, is itself insufficient to satisfy the strict requirements of Executive Law § 259-i. Our courts have so held that ‘[t]he passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the Parole Board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime.’ quoting Matter of Phillips v. Dennison, NYLJ, Oct. 12, 2006, at 23, col 1; Matter of King, 190 A.D.2d at 434).

Here, the interview was largely focused on the crime, with the Board repeatedly preventing Mr. ██████ from speaking about his remorse and his accomplishments. Ex. 1 at 6: 18-19; 7:4-7; 18:21-24-19:1-7. As to Mr. ██████’s accomplishments during 34 years in prison, the Board merely read them into the record, without discussing them with Mr. ██████, suggesting that Mr. ██████’s strong institutional record was not genuinely considered. Ex. 1 at 34-35. See Bruetsch v. New York State Dep't of Corr. & Cmty. Supervision, 43 Misc. 3d 1223(A) (Sup. Ct. 2014) (“The hearing transcript reveals that while the board discussed other factors and Petitioner's achievements while in prison, such discussion was done in a very perfunctory manner, and the board based its decision solely on the instant offense.”).

V. The Board’s Decision to Deny Parole was Impermissibly Pre-Determined and Focused Exclusively on the Crime.

Where there is evidence that the Board’s decision was a foregone conclusion, an individual is entitled to a *de novo* review. See Johnson v. N.Y. Bd. of Parole, 65 A.D.3d 838 (4th Dep’t 2009).

Whether the outcome is predetermined is based on the record before the court. Id.

Two factors establish that the Board’s decision was pre-determined. First, the Board’s decision relies primarily on the nature of the offense and its alleged impact on the ██████

community, rather than [REDACTED] parole packet and presentation. See Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty. 2013) (“When, as here, the Parole Board focuses entirely on the nature of Petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements.”). Second, the confrontational conduct of Commissioners Cruse and Segarra, both who had previously conducted interviews with Appellant, demonstrate their narrow focus on the Appellant’s state of mind at the time of the offense, rather than on the evidence of rehabilitation and remorse provided by Appellant. See Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 2014) (“at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview.”)

VI. The Board’s Reliance on the [REDACTED] Community’s Opposition to Parole is Misplaced because it is Based on Numerous Inaccuracies.

As best counsel can discern from the highly redacted documents that express opposition to Mr. [REDACTED]’s release to parole supervision, they all originate from the [REDACTED] community or Niagara County, where the crime took place.

The first inaccuracy in every petition and letter is the inaccurate assumption that Mr. [REDACTED] will return to Niagara County if he is released to parole supervision. This is not Mr. [REDACTED]’s plan. Mr. [REDACTED] made clear to the Board that he plans to reside in Buffalo, NY in Erie County and he provided letters of assurance from two agencies in Buffalo, Erie County. Ex. 1 at 26-29; Ex. 2, 2021 letters from Back to Basics and Peaceprints. In any case, any proposed housing would have to be approved by parole before release.

The second inaccuracy is that every petition and letter expresses the assumption that, if released, Mr. ██████ will pose a danger to the victim's family and community. This position is devoid of factual basis and wholly ignores who Mr. ██████ is today.

Finally, the opposition petitions and letters mischaracterize the incident. The petitions and letters repeat over and over that Mr. ██████ stalked the victim. Mr. ██████ was not convicted of the crime of stalking and was never charged with such an offense. Numerous petitions and letters make additional unsubstantiated allegations, such as the victim being asleep at the time of the incident; Mr. ██████ having threatened his children in the past; and Mr. ██████ continuing to plan and make threats while incarcerated. All of these allegations lack a factual basis in the parole file.

VII. Denial of Parole Based on the Expression of Sustained Opposition is Irrational.

The Board repeatedly invokes the ██████ community as a basis for denial. First, the Board finds that Mr. ██████'s low risk COMPAS scores are outweighed by the impact on the ██████ community:

“The Panel weighed and considered the results of your COMPAS risks assessment and the low risk scores indicated therein. The panel does not depart from your favorable low scores, however, said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor lessen the horrific long-term impact upon the ██████ community.” Ex. 1 at 48.

Second, the Board uses the ██████ community to claim that Mr. ██████ lacks insight because he did not consider the extent of the pain he caused:

“The panel remains significantly concerned that despite your lengthy confinement you present limited insight by failing to consider the depth and extend (sic) of the pain you caused. The panel is concerned that the ██████ community remains aware of your crime, given sustained opposition to your release throughout your multiple appearances.” *Id.* at 49.

Third, the Board then ends its decision by invoking the community once again:

“The panel suggests you spend time identifying all your victims in recognition of the weight to be borne in merely stating the words remorse and apologize.” *Id.*

This reasoning is irrational. A parole decision cannot hinge on whether a particular community that was impacted by the crime still remembers the crime or is still impacted by the crime. By doing so, the Board is making the parole decision dependent on ambiguous, future events. Whether low COMPAS scores will outweigh the opinions of a fraction of the [REDACTED] community cannot be contingent on a point in time when the community no longer remembers the crime. The Board’s focus on the “long-term” impact and “sustained” nature of the opposition material conveys that until the [REDACTED] community feels differently, release will be denied. While the Board may consider opposition material, its decision should not be dictated by such opposition. Here, the Board’s focus on and “concern” for the “[REDACTED] community” dictated their decision.

VIII. The Board’s Denial of Parole Based on the Victims Difficulty in Finding Solace is Irrational.

While the Board is required to consider victim statements, or in this case victim representative statements, that does authorize the Board to deny parole based on whether a victim or representative has found solace. Yet, here, the Board denied parole citing this factor in the last sentence of the denial decision:

“The surviving traces of your violence, makes it difficult for the victim’s (sic) to find solice (sic).”

The governing law does not permit the Board to determine that release is contingent on an undefined number of unidentified victims finding comfort, or some abatement of grief.

IX. The Board’s Denial of Parole Based on Claim that [REDACTED] Lacked Insight is Not Supported by the Record.

The Board denied parole based on a claim that Mr. [REDACTED] “presents limited insight by failing to consider the depth and extent of the pain you caused.” This is contrary to the record. Mr.

█████ expressed insight and remorse numerous times during the interview. He also expressed the ripple effect of his crime on many people. His remorse and insight are expressed in his personal statement and his apology letters to his two children, who lost their mother due to Mr. █████'s criminal conduct. Ex. 3.

Yet, the Board's denial conveys that Mr. █████ should be aware of a wider range of harm. What that harm is remains ambiguous. Since Mr. █████ recognizes the vast harm he did to the victim's family and his own family, the Board's reference may mean that Mr. █████ should recognize the harm he did to the █████ community. To the extent the Board's "suggestion" that Mr. █████ "spend time identifying all your victims" means the █████ community, this is irrational. Although, any crime has potential to impact beyond the immediate victims and their family and friends, there is no evidence in the record here. The opposition material, all likely emanating from █████ is limited to conveying the harm to the victim's family and unsupported claims that the family would be in danger if Mr. █████ were released.

This reason for denial is not supported by the record and is not explained in detail.

X. The Board Irrationally Held it Against Mr. █████ that He Did Not Have a Definite Residential Address in Buffalo When the Facts Were Clear that Assignment of Housing was Contingent on Release.

During the interview, the Board criticized Mr. █████ for not having a residence "nailed down." Ex. 1 at 28-29. The Board levelled this criticism despite Mr. █████ having current letters of assurance explaining that housing was contingent on release, and contingent on "a referral from the New York State Department of Community Corrections and Supervision, Erie County Parole Division Office." Ex. 2 (Back to Basics 4.15.21 letter and 4.7.21 letter from PeacePrints of WNY)

XI. The Board failed to provide Appellant's counsel with Victim Impact Statements

Based on the denial decision's claim that the victims have not found solace, it appears victim impact statements are in the parole file. Although the entire parole file was requested on November 12, 2021, and portions of the parole file were provided, victim impact statements were not provided to appellant's counsel. Ex. 4. This does not conform with the law. The governing statute does permit access to victim statements; it limits non-disclosure to name and address. *See* Executive Law 259-i(2)(c)(B) ("Where a crime victim or victim's representative as defined in subparagraph (A) of this paragraph, or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential.").

The Board's promulgation of a regulation that keeps victim statements secret from appellant and counsel oversteps the Board's authority to promulgate regulations. *See Matter of New York Const. Materials Ass'n, Inc.* 83 A.D.3d 1323 ("an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute"); *Juarez v New York State Off. of Victim Services*, 169 A.D.3d 52 (3d Dep't 2019) (reversed on other grounds; noting that "an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute"); *Greater New York Taxi Ass'n v New York City Taxi and Limousine Com'n*, 121 A.D.3d 21 (1st Dep't 2014), *affd*, 25 N.Y.3d 600 (2015) ("an agency may not act or promulgate rules in contravention of its enabling statute or charter").

XII. The Board Failed to Issue its Decision in the Statutorily Required Period

Per Executive Law §259-i(2)(a), "[i]f parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole." The Appellant appeared before the Board on September 7, 2021. The

statutory language plainly requires that the Appellant should have been notified of the Board's decision by September 21, 2021. However, Mr. [REDACTED] and did not receive his decision until September 23, 2021, after he filed a grievance. See Ex. 5.

XIII. The Complete Parole File Was Not Provided.

Pursuant to DOCCS Directive #2014, DOCCS is required to produce official opposition contained within the parole file. Undersigned counsel for Mr. [REDACTED] requested the parole file on November 12, 2021, and received some responsive documents. The response did not include official opposition, though it is cited in the transcript and decision. In addition, the parole file produced does not contain the complete 2021 COMPAS report or documentation supporting an OMH Level 4, as referenced in the parole interview. DOCCS refused to provide these documents upon counsel's request. See Ex. 4.

CONCLUSION

In light of these errors, the denial should be reversed, and a *de novo* review should be held before Commissioners who did not participate in the instant denial.

Dated: January 11, 2022

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