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Administrative Appeal Decision - Alberto Rivera (2018-12-28)

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Administrative Appeal Decision Notice

Inmate Name: RIVERA, ALBERTO

Facility: Sing Sing Correctional Facility

NYSID No [REDACTED]

Appeal Control #: 08-103-18 B

Dept. DIN#: 85A3847

Appearances:

For the Board, the Appeals Unit

For Appellant:

Alberto Rivera (85A3847)
Sing Sing CF Office of Community Supervision
354 Hunter Street
Ossining, NY 10562-5442

Board Member(s) who participated in appealed from decision: Alexander, Drake.

Decision appealed from: 8/2018 Denial of Discretionary Release; 12-month hold.

Pleadings considered:

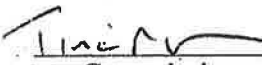


Brief on behalf of the Appellant submitted on: October 17, 2018.

Statement of the Appeals Unit's Findings and Recommendation.

Documents relied upon:

Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole 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	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 12/28/18.
LB

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant raises various issues in the brief he submitted in support of the administrative appeal he initiated following the Board of Parole's decision to deny his immediate release to community supervision following an interview held on or about August 8, 2018. The Appeals Unit has reviewed each of the issues raised by Appellant and finds that the issues have no merit.

The issues raised by Appellant are as follows: (1) the Board's decision to deny Appellant's immediate release to community supervision was irrational; (2) in making its determination to deny Appellant's release back into the community, the Board relied too heavily upon the serious nature of Appellant's current crimes of conviction, as well as his very lengthy and violent prior criminal history; (3) Appellant should be released back into the community due to his [REDACTED] (4) the Board's decision to deny Appellant's immediate release was tantamount to a re-sentencing of Appellant, and violated the Double Jeopardy Clause of the U.S. Constitution; and (5) the Board did not provide sufficient weight to Appellant's "transformation" during his incarceration when making its determination.

As to the first and second issues raised in Appellant's brief, the legal standard governing the decision-making process of the Board when assessing the suitability of an inmate's possible release to community supervision is: (1) whether or not there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law; (2) whether or not the inmate's release is incompatible with the welfare of society; and (3) whether or not the inmate's release will so deprecate the seriousness of the crime as to undermine respect for law. See Executive Law §§259-c(4), 259-i(2)(c)(A); Robles v. Dennison, 745 F. Supp. 2d 244 (W.D.N.Y. 2010); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). In the instant case, the Board considered each of these three factors and specifically relied upon factors (1), (2) and (3) in making its determination to deny Appellant's release to community supervision and further found that it was not convinced that Appellant would live and remain at liberty without violating the law.

"Clearly, the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a [inmate] who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, **bears a heavy burden.**" Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dep't 1997) (emphasis added). See also Matter of Phillips v. Dennison, 41 A.D.3d 17 (1st Dept. 2007).

Unless Appellant is able to demonstrate convincing evidence to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders

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on impropriety. Matter of Jackson v. Evans, 118 A.D.3d 701 (2d Dept. 2014); Matter of Williams v. New York State Div. of Parole, 114 A.D.3d 992 (3rd Dept. 2014); Matter of Thomches v. Evans, 108 A.D.3d 724 (2d Dept. 2013).

In determining whether to grant parole to an inmate, the Board is required to consider a number of statutory factors (see Executive Law §§259-c(4); 259-i(2)(c)(A); 9 NYCRR §8002.2). In addition, the Board's decision must detail the reasons for a denial of discretionary release (see Executive Law §259-i(2)(a)(i)). However, the Board is not required to give each factor it considered equal weight (Matter of Arena v. New York State Dept. of Corr. & Community Supervision, 156 A.D.3d 1101 (3d Dept. 2017); Matter of Hill v. New York State Bd. of Parole, 130 A.D.3d 1130 (3d Dept. 2015); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Vigliotti v. State of N.Y. Exec. Div. of Parole, 98 A.D.3d 789 (3d Dept. 2012); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948 (2d Dept. 2012); Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690 (2d Dept. 2010)), and its actual or perceived emphasis on a specific factor is not improper as long as the Board complied with statutory requirements. Romer v. Dennison, 24 A.D.3d 866 (3d Dept. 2005); Matter of Collado v. New York State Division of Parole, 287 A.D.2d 921 (3d Dept. 2001); Matter of Rivera v. Executive Department, Board of Parole, 268 A.D.2d 928 (3d Dept. 2000).

The Board is entitled to afford more weight to the nature and seriousness of the underlying crimes and the inmate's criminal history than other factors. See Matter of Perez v. Evans, 76 A.D.3d 1130 (3d Dept. 2010). In this regard, the denial of release to community supervision primarily because of the gravity of the inmate's crime is appropriate. Karlin v. Alexander, 57 A.D.3d 1156 (3d Dept. 2008); Matter of Alamo v. New York State Div. of Parole, 52 A.D.3d 1163 (3d Dept. 2008); Matter of Flood v. Travis, 17 A.D.3d 757 (3d Dept. 2005).

The Court of Appeals unanimously affirmed the First Department decision in Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dept. 2008), aff'd, 11 N.Y.3d 777 (2008), in which the Appellate Court held: (1) it is not improper for the Board to primarily base its decision to deny parole release on the seriousness of the offense(s); (2) the weight to be assigned to each factor considered by the Board in making its determination is to be made solely by the Board; (3) parole release should not be granted merely as a reward for good conduct or efficient performance of duties while confined; and (4) the Board can consider the credibility of statements made by the inmate in regard to whether full responsibility was taken for the criminal behavior.

So long as the decision denying release to community supervision is made in accordance with statutory requirements, it is not to be set aside when subject to administrative or judicial review, particularly given the narrow scope of judicial review of discretionary parole denial

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determinations. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013).

An inmate is not automatically entitled to release to community supervision merely because of achievements within a prison’s institutional setting, no matter how numerous. Pearl v. New York State Div. of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Corley v. New York State Div. of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Rivera v. Travis, 289 A.D.2d 829 (3d Dept. 2001). In addition, per Executive Law §259-i(2)(c)(A), an application for release to community supervision shall not be granted merely as a reward for Appellant’s good conduct or achievements while incarcerated. Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001). Therefore, a determination that the inmate’s exemplary achievements are outweighed by the severity of the crimes is within the Board’s discretion. Matter of Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1st Dept. 2005); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004).

Appellant has the burden of showing that the Board's determination was irrational, bordering on impropriety, and therefore arbitrary and capricious, before administrative or judicial intervention is warranted. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Singh v. Dennison, 107 A.D. 3d 1274 (3d Dept. 2013). It is not the function of the Appeals Unit to assess whether the Board gave proper weight to the relevant factors, but only whether the Board followed applicable legal authority when rendering its decision, and that is supported, and not contradicted, by the facts in the record. Matter of Comfort v. New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009); see Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268. The weight to be accorded each of the requisite factors remains solely a matter of the Parole Board’s discretion. See Matter of Dolan v. New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Matter of Singh v. Evans, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Montane v. Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903, appeal dismissed, 24 N.Y.3d 1052 (2014). Appellant has not demonstrated any abuse on the part of the Board in its decision-making process that would warrant a *de novo* release interview.

[REDACTED]
[REDACTED]
[REDACTED] (2) [REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

As to the fourth issue: (1) Appellant's claim that the denial of parole release amounted to a resentencing is without merit. Matter of Valentino v. Evans, 92 A.D.3d 1054 (3d Dept. 2012); Matter of Kalwasinski v. Paterson, 80 A.D.3d 1065 (3d Dept. 2011); Matter of Carter v. Evans, 81 A.D.3d 1031 (3d Dept. 2011); Matter of Crews v. New York State Executive Department Board of Parole Appeals Unit, 281 A.D.2d 672 (3d Dept. 2001); and (2) the provisions of Executive Law §§259-i(1)(a) and 2(c) obligate the Board as a matter of law to consider the severity of the inmate's crime in every release decision. A denial of parole is a decision to withhold early release from the confinement component. It is neither the imposition nor the increase of a sentence, and it is not punishment for purposes of the Double Jeopardy Clause of the Constitution. It is the original criminal sentence that is limited by the Double Jeopardy Clause, not the administrative decision to grant early release from confinement. The Parole Board did not violate the Double Jeopardy Clause by giving consideration to actions for which the inmate has already been punished. Alessi v. Quinlan, 711 F.2d 497 (2d Cir. 1983). The Double Jeopardy Clause applies to judicial proceedings, and not parole matters. Priore v. Nelson, 626 F.2d 211 (2d Cir. 1980). A denial of parole has the effect of perpetuating the status quo – that is, continued incarceration during the term of the sentence. Therefore, the denial does not give rise to multiple punishment for the same offense. U.S. ex rel. Jacobs v. Barc, 141 F.2d 480 (6th Cir. 1944), cert. den., 322 U.S. 751.

As to the fifth issue, as noted above, an inmate is not automatically entitled to release to community supervision merely because of achievements within a prison's institutional setting, no matter how numerous (citations omitted).

Recommendation:

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