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Administrative Appeal Decision - Young, Barrington (2019-02-27)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Young, Barrington **Facility:** Eastern NY CF
NYSID: [REDACTED] **Appeal Control No.:** 08-166-18 B
DIN: 81-A-2872

Appearances: Glenn R. Bruno, Esq.
11 Market Street
Suite 221
Poughkeepsie, New York 12601

Decision appealed: August 2018 decision, denying discretionary release and imposing a hold of 18-months.


Board Member(s) who participated: Cruse, Berliner, Shapiro


Papers considered: Appellant’s Brief received December 24, 2018

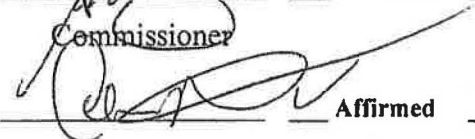
Appeals Unit Review: Statement of the Appeals Unit’s Findings and Recommendation

Records 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 determine that the decision appealed is hereby:

 Affirmed Vacated, remanded for de novo interview Modified to _____
Commissioner

 Affirmed Vacated, remanded for de novo interview Modified to _____
Commissioner

 Affirmed Vacated, remanded for de novo interview Modified to _____
Commissioner

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 2/27/19 66.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the August 2018 determination of the Board, denying release and imposing a 18-month hold.

Appellant raises the following issues in his brief: (1) the Board’s decision was arbitrary and capricious, made in violation of applicable legal authority, and relied too heavily upon the very serious nature of Appellant’s multiple felony convictions; (2) Appellant’s positive accomplishments, rehabilitative efforts, and certain COMPAS scores were not given sufficient consideration by the Board; (3) the Board’s decision was conclusory, lacking sufficient detail; (4) the Board’s decision was made in violation of Appellant’s due process rights under the Constitution; (5) the Board’s decision was based upon a policy of denying parole release to violent felons such as Appellant; (6) the Board’s decision was tantamount to a resentencing of Appellant; (7) the Board failed to consider Appellant’s sentencing minutes; (8) those Commissioners participating in any prior interview with Appellant were precluded from participating in the most recent interview; (9) an Inmate Status Report should have been prepared for Appellant; (10) certain records requested by Appellant’s counsel were not provided to him; (11) Appellant, who remained in the United States illegally “by overstaying my time”, should have been released because he received a final order of deportation; and (12) the 18-month hold was excessive.

As to the first and second issues, discretionary release to parole is not to 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 the 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). “Although these standards are no longer repeated in the [Board’s] regulation, this in no way modifies the statutory mandate requiring their application.” Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate’s institutional record and criminal behavior. 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). While consideration of these factors is mandatory, “the ultimate decision to parole a prisoner is discretionary.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 477. Thus, it is well

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settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17. 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 Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); 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.

As to the third issue, the Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); 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 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 v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983).

As to the fourth issue, an inmate has no Constitutional right to be released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

As to the fifth issue, there is no merit to the claim that the Board decision was predetermined based on an alleged executive policy to deny parole to violent felony offenders. Allegations that the Board has systematically denied parole to prisoners convicted of violent crimes have been dismissed repeatedly by the Courts. See, e.g., Matter of Cartagena v. Alexander, 64 A.D.3d 841, 882 N.Y.S.2d 735 (3d Dept. 2009); Matter of Motti v. Dennison, 38 A.D.3d 1030,

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831 N.Y.S.2d 298 (3d Dept. 2008); Matter of Cardenales v. Dennison, 37 A.D.3d 371, 830 N.Y.S.2d 152 (1st Dept. 2007); Matter of Wood v. Dennison, 25 A.D.3d 1056, 1057, 807 N.Y.S.2d 480, 481 (3d Dept. 2006); Matter of Ameyda v. Travis, 21 A.D.3d 1200, 800 N.Y.S.2d (3d Dept. 2005), lv. denied, 6 N.Y.3d 703, 811 N.Y.S.2d 335 (2006); Matter of Bottom v. Travis, 5 A.D.3d 1027, 773 N.Y.S.2d 717 (4th Dept.), appeal dismissed 2 N.Y.3d 822, 781 N.Y.S.2d 285 (2004); Matter of Lue-Shing v. Pataki, 301 A.D.2d 827, 828, 754 N.Y.S.2d 96, 97 (3d Dept. 2003), lv. denied, 99 N.Y.2d 511, 760 N.Y.S.2d 102 (2003).

As to the sixth issue, Appellant's assertion that the denial of parole release amounted to an improper resentencing 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. See 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). Appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

As to the seventh issue, if the Board makes a diligent effort to obtain sentencing minutes, and the sentencing minutes are unavailable – whereas here, there is an affidavit from the court reporter stating the minutes cannot be located – a new interview is not required. See Matter of Andreo v. Alexander, 72 A.D.3d 1178, 898 N.Y.S.2d 690, 691 (3d Dept. 2010) (court reporter affidavit); Matter of LaSalle v. New York State Div. of Parole, 69 A.D.3d 1252, 893 N.Y.S.2d 706 (3d Dept.), lv. denied, 14 N.Y.2d 709, 901 N.Y.S.2d 142 (2010) (court letter); Matter of Santiago v. New York State Div. of Parole, 78 A.D.3d 953, 911 N.Y.S.2d 436 (2d Dept. 2010) (sufficient evidence of diligent effort); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

As to the eighth issue, Appellant has no basis to complain about the presence of Commissioners on his interview panel whom have previously interviewed him. Nothing bars such participation. The Department's regulations only prohibit Commissioners from participating in the resolution of an administrative appeal from a decision which they rendered. 9 N.Y.C.R.R. §8006.4(d). Additionally, we note that no constitutional or statutory right of Appellant is violated under these circumstances. DiChiaro v. Hammock, 87 A.D.2d 957 (3d Dept. 1982).

As to the ninth issue, the Board Appellant's assertion that the Parole Board Report should not have replaced the former Inmate Status Report invites a discussion which is beyond the scope of this administrative appeal. This is not the proper forum for discussion of this issue. We note

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further that the Parole Board Report has been used in place of the former Inmate Status Report for several years.

As to the tenth issue, the Board may designate certain parole records as confidential. See Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (citing Public Officers Law § 87(2)(a), (f); Executive Law § 259-k(2); 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a), (b)). The Board of Parole is authorized to treat records as confidential if their release “could endanger the life or safety of any person”. Matter of Justice v. Comm’r of New York State Dep’t of Corr. & Cmty. Supervision, 130 A.D.3d 1342 (3rd Dept. 2015) (citing Public Officers Law § 87(2)(a), (f); Executive Law § 259-k(2); 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(3)).

As to the eleventh issue, the existence of a final deportation order does not require an inmate’s release, but is merely one factor to consider. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Matter of Lackwood v. New York State Div. of Parole, 127 A.D.3d 1495, 8 N.Y.S.3d 461 (3d Dept. 2015); People ex rel. Borrell v. New York State Bd. of Parole, 85 A.D.3d 1515, 925 N.Y.S.2d 922 (3d Dept.), lv. denied, 17 N.Y.3d 718, 936 N.Y.S.2d 75 (2011); Matter of Samuel v. Alexander, 69 A.D.3d 861, 892 N.Y.S.2d 557 (2d Dept. 2010).

As to the twelfth issue, the Board has discretion to hold an inmate for a period of up to 24 months. Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b); Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Therefore, the hold of 18 months was not excessive or improper.

Recommendation: Affirm.