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Administrative Appeal Decision - Tor, Budha (2019-06-06)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Tor, Budha

Facility: Woodbourne CF

NYSID: [REDACTED]

**Appeal
Control No.:** 10-102-18 B

DIN: 93-A-5678

Appearances: Thomas A. Kaczowski, Esq.
P.O. Box 203
Wurtsboro, New York 12790

Decision appealed: October 2018 decision, denying discretionary release and imposing a hold of 24 months.


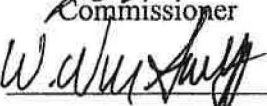
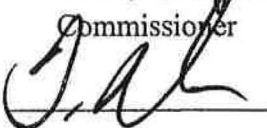
Board Member(s)
who participated: Alexander, Coppola, Davis

Papers considered: Appellant's Brief and Supplemental Brief received April 2, 2019

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:

 Commissioner	<input type="checkbox"/> Affirmed	<input type="checkbox"/> Vacated, remanded for de novo interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Vacated, remanded for de novo interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Vacated, remanded 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 6/6/19.

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Appellant challenges the October 2018 determination of the Board, denying release and imposing a 24-month hold.

Appellant is serving an indeterminate term of imprisonment of 25 years to life after having been convicted by verdict of Murder 2nd. Appellant has a significant criminal history including a prior felony conviction for Attempted Robbery 2nd. In the instant offense, Appellant caused the death of his young female victim by striking her with a hammer. He then placed her body in a plastic bag and threw her body out a third floor window. Appellant was not arrested for this crime until nearly four years after it occurred. Appellant has received numerous disciplinary tickets since his incarceration.

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 serious nature of Appellant's crime of conviction; (2) Appellant's programming, "good behavior and obedient behavior", vocational training, positive accomplishments, rehabilitative efforts, letters of support, remorse, certain COMPAS scores, and release plans were not given sufficient consideration by the Board; (3) the Board's decision lacked sufficient detail; (4) certain issues were not discussed during the interview; (5) the hold imposed by the Board exceeded the guideline range; (6) Board's decision was made in violation of Appellant's due process rights; (7) the Board's decision was tantamount to a resentencing of Appellant; (8) the 24-month hold was excessive; (9) the Board's decision violated the doctrines of res judicata and collateral estoppel; and (10) the Board's decision was made in violation of the double jeopardy clause.

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).

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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 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.

In 2011, the law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259-c(4); 9 N.Y.C.R.R. §8002.2(a). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. See Executive Law § 259-i(2)(c)(A). Thus, the COMPAS instrument cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). 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). Furthermore, declining to afford

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the COMPAS controlling weight does not violate the 2011 amendments. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016).

Inasmuch as Appellant disputes the Board's finding with respect to insight and remorse, it was well within the Board's authority to make an assessment of Appellant's credibility (Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008)). Also, the Board is permitted to conclude that the serious nature of the inmate's offense, as well as limited insight and/or remorse, outweigh other factors. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000), aff'g 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Serrano v. N.Y. State Exec. Dep't-Div. of Parole, 261 A.D.2d 163, 164, 689 N.Y.S.2d 504, 505 (1st Dept. 1999).

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, Appellant was provided the opportunity to discuss with the Board during the interview any issues of interest, and cannot now be heard to complain that certain issues were not discussed, or the extent to which certain issues were discussed. See Matter of Serna v. New York State Division of Parole, 279 A.D.2d 684, 719 N.Y.S. 2d 166 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997).

As to the fifth issue, Appellant's argument that the Board failed to consider the guidelines pursuant to 9 NYCRR §8001.3, we note that the changes made to Executive Law §259-c by Chapter 62 of the Laws of 2011 repealed the requirement for the establishment of written guidelines, and provided instead the requirement that the Board was to implement procedures incorporating risk and needs principles.

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As to the sixth issue, the Supreme Court has held that because a person's liberty interest is extinguished upon conviction, there is no inherent right, or right under the U.S. Constitution, to parole. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Hewitt v. Helms, 459 U.S. 460 (1983). Likewise, there is no due process right to parole under the New York State Constitution. Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979); Matter of Russo, 50 N.Y.2d 69; Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005). Thus, the protections of the due process clause do not apply to the Parole Board's determinations as to whether an inmate should be released to parole supervision. Maldonado v. Evans, 2014 U.S. Dist. LEXIS 183163 (W.D.N.Y. 2014); Barrow v. Vanburen, 2014 U.S. Dist. LEXIS 181466 (N.D.N.Y. 2014); Barna v. Travis, 239 F.3d 169 (2d Cir. 2001). We recognize, however, that while an inmate has no vested right to parole release under the due process clause, there is a liberty interest which requires, as a matter of *procedural* due process, an opportunity to be heard, and a statement of the reasons for the denial of release. Therefore, in deciding whether to grant or deny parole, all the Board must do is: (1) afford the inmate an opportunity to be heard, and (2) if parole is denied, provide the reasons for the denial. Thurman v. Allard, 2004 U.S. Dist. LEXIS 18904 (S.D.N.Y. 2004); Blackett v. Thomas, 293 F.Supp.2d 317 (S.D.N.Y. 2003); Gittens v. Thomas, 2003 U.S. Dist. LEXIS 9087 (S.D.N.Y. 2003). Appellant received both of these constitutional protections and, therefore, any arguments alleging that the Board's decision was made in violation of the due process clause, and in contravention of a liberty interest arising from the due process clause, are without merit.

As to the seventh 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 eighth 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 24 months was not excessive or improper.

As to the ninth issue, Appellant offers no explanation as to how the Board's decision violated the doctrines of collateral estoppel and res judicata, but that there may be "possible ...

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implications”. The Board in this case has not in any way, shape or form even attempted to relitigate any previously determined factual issues. The Board is not collaterally estopped from basing its reappearance decisions that deny parole on the same grounds that it had invoked in its previous determinations. As per Executive Law §259-i(2)(c)(A), the Board is required to consider the same statutory factors each time an inmate appears before it, and thus it stands to reason that in many cases the same aspects of an individual’s record will repeatedly militate against the grant of parole release. Bridget v. Travis, 300 A.D.2d 776 (3d Dept. 2002). As such, the doctrine of collateral estoppel has no relevancy to this case at all. Finally, we note that the doctrine of collateral estoppel has no application in a parole release proceeding. Matter of Bridget v. Travis, 300 A.D.2d 776 (3d Dept. 2002); Matter of Hakim v. Travis, 302 A.D.2d 821 (3d Dept. 2003).

As to the tenth issue, the Board did not violate the double jeopardy clause by giving consideration to actions for which Appellant has already been punished. The Board is obligated by law to consider the inmate’s crimes in every release decision. Executive Law §259-i(2)(c). The Double Jeopardy Clause is not implicated because it applies to judicial proceedings, not parole matters:

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... [I]t is the original criminal sentence that is limited by the Double Jeopardy Clause, not the administrative decision to grant early release from confinement.

Alessi v. Quinlan, 711 F.2d 497, 501 (2d Cir. 1983); see also Bockeno v New York State Bd. of Parole, 227 A.D.2d 751, 642 N.Y.S.2d 97, 98 (3d Dept. 1996). A denial of parole has the effect of perpetuating the status quo, that is, continued incarceration during the term of the sentence, and does not give rise to multiple punishment for the same offense.

Recommendation: Affirm.