December 2020

Administrative Appeal Decision - Gordon, Christopher (2019-04-15)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Gordon, Christopher **Facility:** Bare Hill CF

NYSID: [redacted] **Appeal Control No.:** 07-110-18 B

DIN: 16-B-1506

Appearances: Cheryl L. Kates, Esq.
P.O. Box 734
Fairport, New York 14450

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

Board Member(s) who participated: Smith, Cruse, Agostini

Papers considered: Appellant's Brief received January 30, 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 ✓ **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** _____

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 4/5/19 66.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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

Appellant is serving an aggregate term of imprisonment of 2 2/3 to 8 years imprisonment after having been convicted of Criminal Possession of a Forged Instrument 2nd, and Criminal Impersonation. Appellant was in possession of a forged certificate of liability insurance.

Appellant raises the following issues in his brief: (1) the Board's decision was arbitrary, capricious and irrational, made in violation of applicable legal authority, and placed too much emphasis on the crimes of conviction and community opposition to Appellant's release; (2) the Board did not provide sufficient weight to Appellant's achievements including his receipt of an Earned Eligibility Certificate (EEC) and certain low scores contained in his COMPAS instrument; (3) the Board failed to discuss certain issues with Appellant; (4) the Board's decision was conclusory and lacked sufficient detail; (5) the Board's decision was made in violation of Appellant's due process rights; (6) the Board's decision was made in violation of Appellant's 5th amendment rights; (7) community opposition letters should not have been considered by the Board; (8) letters soliciting parole recommendations from the sentencing court, district attorney and defense counsel need to be sent prior to each and every Board interview; (9) the Board's decision was predetermined; and (10) the 24-month hold was excessive.

Appellant's attorney refers to Appellant as "petitioner" in several places in the brief. This is not correct. This is an administrative appeal and the inmate is properly referred to as "Appellant".

As to the first two issues, 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.

Appellant's receipt of an EEC does not automatically guarantee his release, and it does not eliminate consideration of the statutory factors including the instant offense. Matter of Milling v. Berbary, 31 A.D.3d 1202, 1203, 819 N.Y.S.2d 373, 374 (4th Dept.), lv. denied, 7 N.Y.3d 808, 809, 822 N.Y.S.2d 481 (2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006); Matter of Barad v. New York State Bd. of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), lv. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001). Where an inmate has been awarded an EEC, the Board may deny release to parole on a finding that there is a reasonable probability that, if such inmate is released, the inmate will not live and remain at liberty without violating the law, and that his release is not compatible with the welfare of society. Correction Law §805; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (1st Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992). The standard set forth in Executive Law §259-i(2)(c)(A) requiring consideration of whether the inmate's release will so deprecate the seriousness of his crime as to undermine respect for the law does not apply in cases where an EEC has been awarded.

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 applicable 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 applicable statutory factors. 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).

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Furthermore, declining to afford 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).

As to the third 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 fourth 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 fifth issue, an inmate has no Constitutional right to be conditionally 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 sixth issue, the Board did not violate the Double Jeopardy Clause of the Constitution 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). In other words, a denial of parole has the effect of perpetuating the status quo, i.e., continued incarceration during the term of the sentence, and does not give rise to multiple punishment for the same offense.

We note further that there is no legal requirement that the Board must examine whether there are any appeals of criminal convictions undertaken by Appellant. Not surprisingly, Appellant offers no legal authority to support this claim.

As to the seventh issue, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, --N.Y.S.3d-- (3d Dept. 2018) ("Contrary to petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018) ("the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community"); 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); Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.)(LaBuda A.J.S.C.) (recognizing "[c]onsideration of community or other opposition was proper under the statute" and the Board is required to keep identity of persons opposing release confidential), aff'd sub nom. Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017); Matter of Hamilton v. New York State Bd. of Parole., Index # 3699-2013, *Order and Judgment* dated October 25, 2013 (Devine J.S.C.)(Albany Co. Court)(no showing of prejudice by allegedly false information in PBA online petition where Board acknowledged public opposition during interview), aff'd, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014); cf. Krebs v. N.Y. State Div. of Parole, No. 9:08-CV-255NAMDEP, 2009 WL 2567779, at *12 (N.D.N.Y. Aug. 17, 2009) (public and political pressure "are permissible factors which parole officials may properly consider as they relate to 'whether 'release is not

incompatible with the welfare of society and will not so deprecate the seriousness of the offense as to undermine respect for the law'"); Morel v. Thomas, No. 02 CV 9622 (HB), 2003 WL 21488017, at *5 (S.D.N.Y. June 26, 2003) (same); Seltzer v. Thomas, No. 03 CIV.00931 LTS FM, 2003 WL 21744084, at *4 (S.D.N.Y. July 29, 2003) (same). The same has also long been recognized as true with respect to letters supporting an inmate's potential parole release. See, e.g., Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d at 1273, 990 N.Y.S.2d at 719 (3d Dept. 2014); Matter of Gaston v. Berbary, 16 A.D.3d 1158, 1159, 791 N.Y.S.2d 781, 782 (4th Dept. 2005); Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); Matter of Walker v. Travis, 252 A.D.2d 360, 362, 676 N.Y.S.2d 52, 54 (1st Dept. 1998); cf. Cardenales v. Dennison, 37 A.D.3d 371, 371, 830 N.Y.S.2d 152, 153 (1st Dept. 2007) (Board permissibly determined offense outweighed other positive factors including letters of support from, among others, victim's mother). Indeed, 9 N.Y.C.R.R. §8000.5(c)(2) refers to the security of letters either in support of or in opposition to an inmate's release.; Matter of Costello v. New York State Bd. of Parole, 101 A.D.3d 1512, 957 N.Y.S.2d 486 (3d Dept. 2012) (indicating Board considered Police Commissioner's letter of opposition in original determination to grant open date), rev'd on other grounds 23 N.Y.3d 1002, 1004, 994 N.Y.S.2d 39 (2014); Matter of LaBarbera v. New York State Div. of Parole, Index No. 12711/18, Decision/Order of Jan. 17, 2019 (Sup. Ct. Columbia Co.) (Mott, J.S.C.) (Board properly considered community opposition); Matter of Bottom v. Dep't of Corr. & Cmty. Supervision, Index No. 902448-17, *Judgment* dated Jan. 10, 2018 (Sup. Ct. Albany Co.) (DeBow A.S.C.J.) (rejecting challenge to Board's reliance on community opposition where majority of submissions addressed matters permitted by Executive Law and [per Duffy] there was no indication Board was influenced by improper objections predicated solely on victims' police officer status); Matter of Bottom v. Dep't of Corr. & Cmty. Supervision, Index No. 902448-17, *Decision & Order* dated Nov. 2, 2017 (Sup. Ct. Albany Co.) (DeBow A.S.C.J.) (recognizing Board may consider letters from private citizens while non-individualized objections based on class of crime would be improper); Matter of Comfort v. New York State Bd. of Parole, Index No. 3299-17, *Decision & Order* dated Oct. 27, 2017 (Sup. Ct. Albany Co.) (Koweek A.S.C.J.) (rejecting challenge to community opposition and speculative allegation that Board considered erroneous information therein); Matter of Hayes v. New York State Bd. of Parole, Index No. 200-2017, *Decision & Order* dated May 3, 2017 (Sup. Ct. Sullivan) (Schick J.S.C.) (rejecting challenge to Board decision based on reliance on community opposition including by PBA); Matter of Reyes v. Stanford, Index No. 1674/2017, *Decision, Order & Judgment* dated Sept. 21, 2017 (Supt. Ct. Dutchess Co.) (Forman A.S.C.J.) (concluding community opposition is an appropriate factor the Board may consider **but** treated as harmless misstatement); Matter of Bailey v. New York State Div. of Parole, Index No. 973-16, *Decision & Judgment* dated Aug. 17, 2016 (Sup. Ct. Albany Co.) (Hartman A.J.S.C.) (rejecting challenge to Board decision based on reliance on letters generated by police officers' union [even assuming letters contained inaccuracies or were inflammatory, Board would be permitted to

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consider them for what they were worthy per Duffy and will be presumed not to have relied on inappropriate matters therein unless decision indicates otherwise]); Matter of Gordon v. Stanford, Index No. 788-16, *Decision & Order* dated June 17, 2016 (Sup. Ct. Albany Co.) (McGrath J.S.C.) (finding no error in Board's consideration of community opposition, which was mentioned during interview), aff'd on other grounds Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017) (remaining claims unpreserved for review).

As to the eighth issue, there is no requirement that letters soliciting parole recommendations from the sentencing court, district attorney and defense counsel need to be sent prior to each and every Board interview.

As to the ninth issue, 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 (3d Dept. 1992). The Board is presumed to have followed applicable statutory requirements and internal policies when making decisions regarding the suitability of an inmate's possible release to parole supervision. See Garner v. Jones, 529 U.S. 244 (2000). There is no evidence that the Board's decision was predetermined. See Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

As to the tenth 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.

Recommendation: Affirm.