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Administrative Appeal Decision - Ack, Darren (2019-06-06)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Ack, Darren

Facility: Marcy CF

NYSID: [REDACTED]

Appeal Control No.: 12-028-18 B

DIN: 99-A-2716

Appearances: Darren Ack 99A2716
Marcy Correctional Facility
Box 3600
Marcy, New York 13403

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

Board Member(s) who participated: Coppola, Drake

Papers considered: Appellant's Brief received February 25, 2019

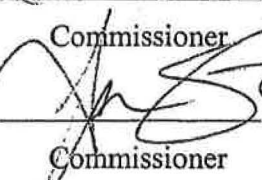
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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:

 **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 6/6/19 66.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Ack, Darren

DIN: 99-A-2716

Facility: Marcy CF

AC No.: 12-028-18 B

Findings: (Page 1 of 2)

Appellant challenges the November 2018 determination of the Board, denying release and imposing a 24-month hold. Appellant is serving time for committing two separate sex offenses, having raped two different victims. Appellant raises the following issues: 1) the decision is arbitrary and capricious because the amended statutes and regulations are evidence based, but the Board fails to follow the requirements. 2) by stating in the interview that the COMPAS is not reliable or useful for sex offenses, the Board had predetermined the decision. 3) the Board failed to review his sentencing minutes. 4) the decision violated the due process clause of the constitution.

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. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS 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). 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. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. That is exactly what occurred here. Amended 9 NYCRR § 8002.2(a) did not alter this approach. The amended regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when the Board departs from scales in denying an inmate release. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2.

In any event, several of appellant's COMPAS scores were in the high category anyway.

There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000). There is no evidence the Board's decision was predetermined based upon the instant offense. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Ack, Darren

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Findings: (Page 2 of 2)

There is no merit to the claim that the Board decision was predetermined based on an unwritten policy to deny parole to sex offenders at moderate or high risk of reoffending. Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017). Appellant has failed to overcome the presumption that the Board complied with its duty. See Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136 (2d Dept. 1985).

While the Board did not possess the sentencing minutes at the time of the interview, despite a diligent effort to obtain them, the Appeals Unit has been able to obtain them since his appearance before the Board. A review of those minutes reveals the court made no recommendation with respect to parole. Accordingly, any error in failing to consider them is harmless and does not provide a basis for setting aside the appealed from decision. Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of Davis v. Lemons, 73 A.D.3d 1354, 899 N.Y.S.2d 919 (3d Dept. 2010); Matter of Valerio v. New York State Div. of Parole, 59 A.D.3d 802, 872 N.Y.S.2d 606 (3d Dept. 2009).

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).

Nothing in the due process clause requires the Parole Board to specify the particular evidence on which rests the discretionary determination an inmate is not ready for conditional release. Duettel v. Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010). There is no due process requirement that the Parole Board disclose its release criteria. Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975). The due process clause is not violated by the Board’s balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v. Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v. Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014). Parole is not constitutionally based, but is a creature of statute which may be imposed subject to conditions imposed by the state legislature. Banks v. Stanford, 159 A.D.3d 134, 71 N.Y.S.3d 515 (2d Dept. 2018).

Recommendation: Affirm.