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December 2020

### Administrative Appeal Decision - Smith, Demetrius (2018-12-28)

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STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

**Inmate Name:** Smith, Demetrius

**Facility:** Otisville Correctional Facility

**NYSID No.** [REDACTED]

**Appeal Control No.:** 07-186-18B

**DIN:** 17-R-2892

Appearances:

**For the Board:** The Appeals Unit

**For Appellant:** Demetrius Smith, 17-R-2892  
Otisville Correctional Facility  
57 Sanitorium Road  
P.O. Box 8  
Otisville, New York 10963-0008

Board Member(s) who participated in appealed from decision: **Crangle, Coppola**

Decision appealed from: 7/2018 Hold to Parole Eligibility Date.

Pleadings considered: Brief on behalf of the appellant received on October 17, 2018  
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, 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



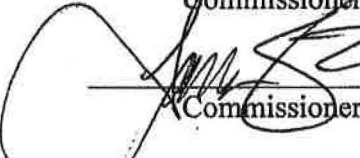
Commissioner

**Affirmed**  **Reversed for De Novo Interview**  **Modified to** \_\_\_\_\_



Commissioner

**Affirmed**  **Reversed for De Novo Interview**  **Modified to** \_\_\_\_\_



Commissioner

**Affirmed**  **Reversed for De Novo Interview**  **Modified to** \_\_\_\_\_

*If the Final Determination is at variance with findings and recommendation of Appeals Unit, the written reasons for such determination shall be annexed hereto.*

This Final Determination, the related Statement of the Appeals Unit's Findings and separate findings of the 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

STATE OF NEW YORK - BOARD OF PAROLE

**STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION**

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**Findings:** (Page 1 of 3)

Appellant was sentenced to three and a half to seven years upon his conviction of Attempted Enterprise Corruption. In the instant appeal, Appellant challenges the Board of Parole's July 2018 decision to deny discretionary release to parole as arbitrary and capricious because the Board allegedly failed to fairly consider and weigh the required statutory factors. Specifically, Appellant asserts the Board's emphasis on prior unlawful behavior was irrational and improper, as he has one prior felony conviction while any other arrests/charges were dismissed or sealed under CPL 160.50 and his criminal record compares favorably to other SHOCK graduates who were granted parole. He also highlights his completion of the DOCCS SHOCK program, receipt of an EEC and clean discipline. These arguments are without merit.

As an initial matter, 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). 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). An EEC does not automatically guarantee release or 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). 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).

While consideration of the statutory factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely

STATE OF NEW YORK - BOARD OF PAROLE

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**DIN:** 17-R-2892

**Appeal Control No.:** 07-186-18B

**Findings:** (Page 2 of 3)

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, 990 N.Y.S.2d at 717; 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 Corley v. New York State Div. of Parole, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818 (3d Dept. 2006). 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 McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990).

The record here reflects that the Board considered the appropriate factors, including: the instant offense involving an organized criminal check forgery and larceny operation over a four-year period; Appellant's criminal history; and his institutional record including SHOCK participation, receipt of an EEC and good discipline. The Board also had before it and considered, among other things, the pre-sentence investigation report, an official statement by the District Attorney, the Parole Board Report, Appellant's case plan, and the COMPAS instrument. After considering all required factors, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. See generally Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015). In reaching its conclusion, the Board permissibly relied on the COMPAS instrument's high risk score for felony violence, Appellant's record reflecting prior unlawful behavior, and the instant offense of attempted enterprise corruption; the Board questioned his judgment and disregard for the law. Executive Law §§ 259-c(4), 259-i(2)(c)(A); Matter of Furman v. Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016); Matter of Singh v. Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept.), *lv. denied*, 24 N.Y.3d 906, 995 N.Y.S.2d 715 (2014); Matter of Fuchino, 255 A.D.2d at 914, 680 N.Y.S.2d at 390.

While objecting to the Board's reliance on prior unlawful behavior, Appellant does not dispute he has a prior felony assault conviction. This is substantiated by the pre-sentence investigation report, which the Board is required to consider and entitled to rely upon. Executive Law §259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), *lv. denied* 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). There is no indication the Board relied on erroneous information concerning his history. As for parole decisions involving other inmates, "[t]here is no entitlement to parole based upon comparison

STATE OF NEW YORK - BOARD OF PAROLE

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**DIN:** 17-R-2892

**Appeal Control No.:** 07-186-18B

**Findings:** (Page 3 of 3)

with the particulars of other applicants. Rather, each case is sui generis, and the Board has full authority in each instance to give the various factors a unique weighted value.” Matter of Phillips v. Dennison, 41 A.D.3d 17, 22, 834 N.Y.S.2d 121, 124-25 (1st Dept. 2007).

**Recommendation:**

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