December 2020

Administrative Appeal Decision - Jones, Dwayne (2018-12-28)

STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: Jones, Dwayne **Facility:** Marcy Correctional Facility

NYSID No. [redacted] **Appeal Control No.:** 09-008-18B

DIN: 17-A-4791

Appearances:
For the Board: The Appeals Unit

For Appellant: Dwayne Jones, 17-A-4791
Marcy Correctional Facility
9000 Old River Road
P.O. Box 5000
Marcy, New York 13403-5000

Board Member(s) who participated in appealed from decision: **Alexander, Drake**

Decision appealed from: 8/2018 Denial of Discretionary Release with a 24-Month Hold.

Pleadings considered: Letter on behalf of the appellant received on September 14, 2018
Letter on behalf of the appellant received on September 25, 2018
Statement of the Appeals Unit's Findings and Recommendation

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

_____ ✓ **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** _____
Commissioner

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

P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

Inmate Name: Jones, Dwayne **Facility:** Marcy Correctional Facility

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Findings: (Page 1 of 4)

Appellant was sentenced to two to four years upon his conviction of Grand Larceny in the third degree. In the instant appeal, Appellant challenges the Board of Parole's August 2018 decision to deny discretionary release to parole as arbitrary and capricious. Specifically, Appellant objects that the decision mentions his [redacted] removal but he was not specifically asked about the removal during the interview and given the opportunity to refute the reasons given by DOCCS. He also appears to suggest the matter was outside the scope of the Executive Law. In addition, Appellant appears to claim the Board emphasized his criminal history and lack of insight without adequately considering his receipt of an EEC and COMPAS scores. 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 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).

In 2011, the law was amended to further require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). 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 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 criminal history. The amendments also did not change the 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 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 applicable 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).

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 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 King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. 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 as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant took a purse in the lobby of an apartment; Appellant's extensive multi-state criminal history dating back to the 1980s and including four prior NYS terms; institutional record including receipt of an EEC, completion of custodial maintenance, participation in [redacted] that resulted in removal, and discipline with a Tier II infraction; [redacted] and release plans to seek transfer to N.C. and oversee his sister's employees. The Board also had before it and considered, among other things, Appellant's case plan, the COMPAS instrument, and Appellant's letter to the Board. During the interview, Appellant advised that he did not commit the crime of which he was accused,

explaining that he found the purse and his crime, or "brain cramp," was not turning it in. (Tr. at 4.) When asked why, in light of his criminal history, he should be released and the community should feel safe, Appellant referred to his written presentation and highlighted the potential savings to taxpayers due to his [redacted] suggested he would engage in youth outreach at NYC jails; and reflected on years wasted and that all he acquired since coming in and out of custody was knowledge of the law, which he felt was necessary. (Tr. at 6, 10-13.)

After considering all required factors, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. In reaching its conclusion, the Board permissibly relied on Appellant's pattern of committing so many crimes and, departing from low COMPAS risk scores, demonstrated lack of insight in his presentation during the interview. See Matter of Silmon, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704; 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 Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013). [redacted] The Board encouraged him to continue to program to gain the tools to be law abiding, and to develop a stronger, more realistic release plan. See Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016). The Board acted within its discretion in determining these considerations rebutted any presumption created by the EEC and rendered discretionary release inappropriate at this time. See generally Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015).

[redacted] An inmate's institutional record, including program accomplishments, falls directly within the statutory factors. Executive Law § 259-i(2)(c)(A)(i). Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 706, 708 (2000); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); cf. Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). That [redacted] Furthermore, the interview transcript reflects that Appellant was given ample

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opportunity to discuss relevant matters, including his programming, during the interview. We note the panel was comprised solely of Board members. Executive Law § 259-b.

The Board also committed no error by relying on Appellant's lack of insight. See Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; Matter of Ward v. New York State Division of Parole, 26 A.D.3d 712, 809 N.Y.S.2d 671 (3d Dept.), lv. denied, 7 N.Y.3d 702, 818 N.Y.S.2d 193 (2006); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (1st Dept. 1992). The assessment was within the Board's authority and there is ample record support.

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was so irrational as to border on impropriety.

Recommendation:

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