December 2020

# Administrative Appeal Decision - Rodriguez, Efrain (2018-12-28)

STATE OF NEW YORK – BOARD OF PAROLE

# *Administrative Appeal Decision Notice*

**Inmate Name**: RODRIGUEZ, EFRAIN **Facility**: Green Haven Correctional Facility

**NYSID No.**: [redacted] **Appeal Control #**: 06-021-18 B

**Dept. DIN#**: 78C0478

Appearances:
For the Board, the Appeals Unit
For Appellant:

Joshua Mitzman, Esq.
11 Market Street, Suite 221
Poughkeepsie, New York 12601

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

Decision appealed from: 5/2018 Denial of Discretionary Release; 12-month hold.

Pleadings considered:
Brief on behalf of the Appellant submitted on: October 1, 2018.
Statement of the Appeals Unit's Findings and Recommendation.

Documents 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 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, 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 12/28/18 (AH).

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**: RODRIGUEZ, EFRAIN
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Appellant raises various issues in the brief he submitted in support of the administrative appeal he initiated following the Board of Parole's decision to deny his immediate release to community supervision following an interview held on or about May 24, 2018. The Appeals Unit has reviewed each of the issues raised by Appellant and finds that the issues have no merit.

As a preliminary note, in his 105-page brief, Appellant raises many of the same issues many times in different places throughout his lengthy brief. In addition, the brief is replete with issues that have been waived because they were not raised during the Board interview and therefore have not been preserved for review herein. 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 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235 (1st Dept. 1997). Certainly this would include any issues relating to any alleged errors in any records before the Board for consideration. See Matter of Shaffer v. Leonardo, 179 A.D.2d 980 (3d Dept. 1992); Matter of Morrison v. Evans, 81 A.D.3d 1073 (3d Dept. 2011); Matter of Jones v. New York State Div. of Parole, 24 A.D.3d 827 (3d Dept. 2005). Appellant could also have requested an adjournment of the interview to address not only any alleged errors in records, but any other matters of concern.

With the aforementioned considerations in mind, the Appeals Unit identifies the following issues which are properly before the Appeals Unit for consideration: (1) the Board's decision to deny Appellant's immediate release back into the community was arbitrary and capricious, made in violation of applicable legal authority, and based solely upon the very serious nature of the controlling convictions and Appellant's extensive prior criminal record; (2) the Board did not provide sufficient weight to certain scores contained in Appellant's COMPAS instrument; (3) Appellant alleges that various records before the Board at the time of the interview contained errors, and that the Inmate Status Report and other issues were not discussed during the interview; (4) certain records were not provided to Appellant and his counsel prior to the Board interview; (5) the Board's decision lacked sufficient detail; (6) the 12-month hold imposed by the Board following the interview was excessive; (7) there should have been more than two Commissioners serving on the panel at the time of the interview; (8) the Board's decision was made in violation of Appellant's due process rights; (9) the Board's decision was tantamount to a resentencing of Appellant; (10) the Board has systematically denied parole to violent felons, and there is also a public policy against their release, which is attributed to "political influence"; (11) the Board failed to provide Appellant with guidance as to how to improve his chances for parole in the future; (12) the Board "overlooked", or "inadequately considered", the parole packet Appellant submitted to the Board; and (13) many provisions of law relied upon by the Board in making its determination should be changed, and should no longer be consider by the Board.

STATE OF NEW YORK - BOARD OF PAROLE

***STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION***

**Inmate Name**: RODRIGUEZ, EFRAIN
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As to the first issue raised by Appellant in his brief, the legal standard governing the decision-making process of the Board when assessing the suitability of an inmate's possible release to community supervision is: (1) whether or not there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law; (2) whether or not the inmate's release is incompatible with the welfare of society; and (3) whether or not the inmate's release will so deprecate the seriousness of the crime as to undermine respect for law. See Executive Law §§259-c(4), 259-i(2)(c)(A); Robles v. Dennison, 745 F. Supp. 2d 244 (W.D.N.Y. 2010); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). In the instant case, the Board considered each of these three factors and specifically relied upon factors (2) and (3) in making its determination to deny Appellant's release to community supervision and further found that it was not convinced that Appellant would live and remain at liberty without violating the law.

"Clearly, the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a [inmate] who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, **bears a heavy burden**." Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dep't 1997) (emphasis added). See also Matter of Phillips v. Dennison, 41 A.D.3d 17 (1st Dept. 2007).

Unless Appellant is able to demonstrate convincing evidence to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders on impropriety. Matter of Jackson v. Evans, 118 A.D.3d 701 (2d Dept. 2014); Matter of Williams v. New York State Div. of Parole, 114 A.D.3d 992 (3rd Dept. 2014); Matter of Thomches v. Evans, 108 A.D.3d 724 (2d Dept. 2013).

In determining whether to grant parole to an inmate, the Board is required to consider a number of statutory factors (see Executive Law §§259-c(4); 259-i(2)(c)(A); 9 NYCRR §8002.2). In addition, the Board's decision must detail the reasons for a denial of discretionary release (see Executive Law §259–i(2)(a)(i)). However, the Board is not required to give each factor it considered equal weight (Matter of Arena v. New York State Dept. of Corr. & Community Supervision, 156 A.D.3d 1101 (3d Dept. 2017); Matter of Hill v. New York State Bd. of Parole, 130 A.D.3d 1130 (3d Dept. 2015); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Vigliotti v. State of N.Y. Exec. Div. of Parole, 98 A.D.3d 789 (3d Dept. 2012); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948 (2d Dept. 2012); Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690 (2d Dept. 2010)), and its actual or perceived emphasis on a specific factor is not improper as long as the Board complied with statutory requirements. Romer v. Dennison, 24 A.D.3d 866 (3d Dept. 2005); Matter of Collado v.

New York State Division of Parole, 287 A.D.2d 921 (3d Dept. 2001); Matter of Rivera v. Executive Department, Board of Parole, 268 A.D.2d 928 (3d Dept. 2000).

The Board is entitled to afford more weight to the nature and seriousness of the underlying crime(s) and the inmate's criminal history than other factors. See Matter of Perez v. Evans, 76 A.D.3d 1130 (3d Dept. 2010). In this regard, the denial of release to community supervision primarily because of the gravity of the inmate's crime is appropriate. Karlin v. Alexander, 57 A.D.3d 1156 (3d Dept. 2008); Matter of Alamo v. New York State Div. of Parole, 52 A.D.3d 1163 (3d Dept. 2008); Matter of Flood v. Travis, 17 A.D.3d 757 (3d Dept. 2005).

The Court of Appeals unanimously affirmed the First Department decision in Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dept. 2008), aff'd, 11 N.Y.3d 777 (2008), in which the Appellate Court held: (1) it is not improper for the Board to primarily base its decision to deny parole release on the seriousness of the offense(s); (2) the weight to be assigned to each factor considered by the Board in making its determination is to be made solely by the Board; (3) parole release should not granted merely as a reward for good conduct or efficient performance of duties while confined; and (4) the Board can consider the credibility of statements made by the inmate in regard to whether full responsibility was taken for the criminal behavior.

So long as the decision denying release to community supervision is made in accordance with statutory requirements, it is not to be set aside when subject to administrative or judicial review, particularly given the narrow scope of judicial review of discretionary parole denial determinations. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013).

An inmate is not automatically entitled to release to community supervision merely because of achievements within a prison's institutional setting, no matter how numerous. Pearl v. New York State Div. of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Corley v. New York State Div. of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Rivera v. Travis, 289 A.D.2d 829 (3d Dept. 2001). In addition, per Executive Law §259-i(2)(c)(A), an application for release to community supervision shall not be granted merely as a reward for Appellant's good conduct or achievements while incarcerated. Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001). Therefore, a determination that the inmate's exemplary achievements are outweighed by the severity of the crimes is within the Board's discretion. Matter of Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1st Dept. 2005); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004).

Appellant has the burden of showing that the Board's determination was irrational, bordering on impropriety, and therefore arbitrary and capricious, before administrative or judicial intervention is warranted. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Singh v. Dennison, 107 A.D. 3d 1274 (3d Dept. 2013). It is not the function of the Appeals Unit to assess whether the Board gave proper weight to the relevant factors, but only whether the Board followed applicable legal authority when rendering its decision, and that is supported, and not contradicted, by the facts in the record. Matter of Comfort v. New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009); see Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268. The weight to be accorded each of the requisite factors remains solely a matter of the Parole Board's discretion. See Matter of Dolan v. New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Matter of Singh v. Evans, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Montane v. Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903, appeal dismissed, 24 N.Y.3d 1052 (2014). Appellant has not demonstrated any abuse on the part of the Board in its decision-making process that would warrant a *de novo* release interview.

As to the second issue raised by Appellant, in determining an inmate's suitability for possible release to community supervision, the Board must consider the institutional record of the inmate. See §259-i(2)(c)(A)(i); 9 N.Y.C.R.R. §8002.2(d)(1). One of the institutional records the Board must consider in making its determination as to the suitability of an inmate's possible release to community supervision is a risk and needs assessment designed to measure the inmate's rehabilitation. See Executive Law §259-c(4). In strict compliance with statutory and regulatory requirements, the Department of Corrections and Community Supervision promulgated Directive 8500 which provides comprehensive operating procedures governing the Correctional Offender Management Profiling for Alternative Sanctions instrument, commonly referred to as the COMPAS instrument, a research based clinical assessment instrument used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other interventions. "By adopting the COMPAS risk assessment and utilizing it in considering an inmate's release, the Board has effectively complied with the minimal requirements of the amendments to the Executive Law." Matter of Steven Diaz v. New York State Bd. of Parole, 42 Misc. 3d 532 (Sup. Ct.; Cayuga Co. 2013).

The information contained in the COMPAS instrument is used to assist the Board of Parole in making its decision, but the quantified results contained in the COMPAS instrument are not alone determinative factors in the decision-making process. See Executive Law §§259-c(4), 259-i(2)(c)(A); Matter of Leung v. Evans, 120 A.D.3d (3d Dept. 2014), lv. denied 24 N.Y.3d 914 (2015); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107 (3d Dept. 2014); accord, Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014). Moreover, uniformly low

COMPAS scores and other evidence of an inmate's rehabilitation do not undermine the broader questions of public safety, public perceptions of the seriousness of a crime, and whether an inmate's release to parole would undermine respect for the law. Thus, the COMPAS instrument cannot mandate a particular result, and the Board determines the weight to be ascribed to the information contained therein. Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016).

The COMPAS instrument is used to develop the inmate's Offender Case Plan (formerly called the "Transitional Accountability Plan" or "TAP"), which is created for, and in cooperation with, an inmate by an Offender Rehabilitation Coordinator (ORC). The Case Plan serves to prioritize the inmate's needs and establish goals to address these needs, and further provides tasks designed to achieve these goals. Case Plans are reviewed with the inmate quarterly unless the inmate is more than four years from the earliest release date in which instance it is reviewed less frequently. A Case Plan was prepared for Appellant and made available to the Board at the time of the interview.

Appellant limits his remarks with respect to the COMPAS instrument to certain "Low" scores contained therein. However, he did score a "Medium" risk for History of Violence, and "Probable" for Low Family Support. Also, there are several more pages of narrative and scales contained in the COMPAS instrument that the Board also reviewed and considered in making its decision to deny parole release. The Board in deviating from the low COMPAS scores looked at all of these factors as well as all of the other records before it at the time of the interview, and of course considered what was discussed during the interview.

As to the third issue raised by Appellant, during the very lengthy 32-page interview, Appellant discussed with the Board the extent of injuries to a detective, and the panel acknowledged his response. No other mention is made of any alleged errors in any records before the Board at the time of the interview. No issues were raised regarding the Inmate Status Report. To the extent that certain issues were not discussed during the interview, including but not limited to a discussion of any alleged errors contained in records before the Board at the time of the interview, they have been waived. Appellant was provided the opportunity to discuss the aforementioned issues with the Board during the interview, and cannot now be heard to complain that these were not discussed, or the extent to which certain issues were discussed, as he failed to raise these issues at that time. See Matter of Morrison v. Evans, 81 A.D.3d 1073 (3d Dept. 2011); Matter of Jones v. New York State Div. of Parole, 24 A.D.3d 827 (3d Dept. 2005); Matter of Serna v. New York State Division of Parole, 279 A.D.2d 684 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235 (1st Dept. 1997).

As to the fourth issue, Appellant could have reviewed his parole records with staff at his facility prior to his interview with the Board. In addition, he, and his attorney, could have requested records from the Department's FOIL Unit, and if certain records were redacted or withheld, a FOIL appeal could have been filed. Accordingly, this issue has no merit.

As to the fifth issue, when read against settled case law and the interview transcript, it cannot be said that the reasons provided by the Board in its decision denying Appellant's release to community supervision were improper or proscribed under §259-i(2)(c)(A) of the Executive Law. The reasons provided for denying Appellant's release to community supervision were properly detailed as required by the Executive Law and not stated in conclusory terms, and further, were supported by the record. The Board's decision denying Appellant's release to community supervision is rational and should be sustained. Corley v. New York State Division of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Matter of Dorman v. New York State Board of Parole, 30 A.D.3d 880 (3d Dept. 2006); Matter of Pearl v. New York State Division of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Matter of Cornejo v. New York State Division of Parole, 269 A.D.2d 713 (3d Dept. 2000).

Since the Board's decision was sufficiently detailed to apprise Appellant of the reasons for the denial of parole release, no further detail was necessary. Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677 (3d Dept. 1993). Furthermore, there are no statutory, regulatory or due process requirements that the internal deliberations or discussions of the Board following its interview with a parole eligible inmate appear on the record. Matter of Collins v. Hammock, 96 A.D.2d 733(4th Dept. 1983); Matter of Dow v. Hammock, 118 Misc.2d 462 (Sup. Ct., Wyoming Co., March 31, 1983).

As to the sixth issue, in instances where release to community supervision is denied, the Board shall establish a date for reconsideration which shall not exceed 24 months from the date of the interview. See Executive Law §259-i(2)(a); 9 NYCRR §8002.3(b); Matter of Abascal v. New York State Board of Parole, 23 A.D.3d 740 (3d Dept. 2005); Matter of Tatta v. State, 290 A.D.2d 907 (3d Dept. 2002). Therefore, the 12-month hold was proper.

As to the seventh issue, 9 N.Y.C.R.R. §8002.1(b) explicitly states that a parole release interview "shall be conducted by a panel of at least two members of the board". Two members of the Board conducted the interview with Appellant, which was proper. Also, we note that Appellant failed to object to the two member panel during the interview, thereby waiving consideration of this issue by the Appeals Unit.

As to the eighth issue, Appellant claims that a constitutionally protected due process right was violated by the Board in making its determination. Initially, we note that 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 ninth issue, Appellant's claim that the denial of parole release amounted to a resentencing is without merit. Matter of Valentino v. Evans, 92 A.D.3d 1054 (3d Dept. 2012); Matter of Kalwasinski v. Paterson, 80 A.D.3d 1065 (3d Dept. 2011); Matter of Carter v. Evans, 81 A.D.3d 1031 (3d Dept. 2011); Matter of Crews v. New York State Executive Department Board of Parole Appeals Unit, 281 A.D.2d 672 (3d Dept. 2001).

As to the tenth issue, allegations that the New York State Parole Board has systematically denied parole to prisoners convicted of violent crimes have been dismissed by the Courts. The Parole Board does not have a predetermined policy of denying release on parole to violent felony offenders. Barna v. Travis, 239 F.3d 169 (2d Cir. 2001); Matter of Garofolo v. Dennison, 53 AD3d 734 (3d Dept. 2008); Matter of Motti v. Dennison, 38 A.D.3d 1030 (3d Dept. 2007); Matter of Ward v. New York State Div. of Parole, 26 A.D.3d 712 (3d Dept. 2006); Matter of Tatta v. Dennison, 26 A.D.3d 663 (3d Dept. 2006).

As to the eleventh issue, Appellant has no due process right to a statement from the Board as to what he should do to improve chances for parole. Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979).

As to the twelfth issue, the Board stated during the interview that it had received and reviewed Appellant's parole packet and lengthy submissions. As previously noted above, to the extent Appellant wanted to discuss in further detail any issues relating to these submissions, he had the opportunity to do so during the Board interview and cannot now be heard to complain.

As to the thirteenth issue, the Appeals Unit obviously does not perform the powers of the State Legislature and the Governor with respect to the amendment and/or repeal of statutes, or Chapters of law, or the passage of such laws, and does not perform all the steps required for adoption of regulations. Appellant dedicates many pages to these kinds of arguments which fall far beyond the scope of this review.

Finally, we note that 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).

**Recommendation:**

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