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Administrative Appeal Decision - Vittorio, Frank (2019-05-10)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Vittorio, Frank

Facility: Southport CF

NYSID: [REDACTED]

**Appeal
Control No.:** 11-055-18 B

DIN: 17-B-1002

Appearances: Frank Vittorio, 17-B-1002
Southport C.F.
236 Bob Masia Drive
P.O. Box 2000
Pine City, NY 14871-2000

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

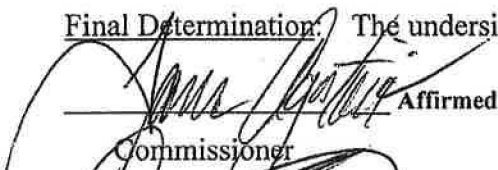
Board Member(s)
who participated: **Smith, Coppola**

Papers considered: Appellant's Letter-brief received February 3, 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 5/10/19 6:06.

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

Name: Vittorio, Frank

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Facility: Southport CF

AC No.: 11-055-18 B

Findings: (Page 1 of 2)

Appellant was sentenced to two years, four months to seven years upon his conviction of two counts of DWI – 3d Offense. In the instant appeal, Appellant challenges the October 2018 determination of the Board denying release and imposing a 24-month hold as excessive. He highlights such matters as his program achievements, clean disciplinary record and receipt of an EEC.

Generally, discretionary release to parole is not to be granted unless the Board determines that an inmate meets three standards: “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). The Board must consider factors relevant to the specific inmate, including, but not limited to, the inmate’s institutional record and criminal behavior. Executive Law § 259-i(2)(c)(A). In addition, the Board must consider the inmate’s most current risk and needs assessment (*i.e.*, COMPAS instrument) and offender case plan. Executive Law § 259–c(4); Correction Law § 71-a. Whereas here the inmate has received 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 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). An EEC does not automatically guarantee release or eliminate consideration of the statutory factors, including the instant offense. 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); Matter of Pearl v. New York State Div. of Parole, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817 (3d Dept. 2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006).

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). 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,

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AC No.: 11-055-18 B

Findings: (Page 2 of 2)

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 DWI offenses, the second of which was committed while Appellant was out on bail for the first; Appellant's criminal history including three prior State terms, misdemeanors for drinking and driving and parole violations; [REDACTED]; his institutional record including receipt of an EEC, [REDACTED] and clean discipline; and release plans to live with a friend and return to work. The Board also had before it and considered, among other things, official statements from the sentencing court and defense attorney, Appellant's case plan, the COMPAS instrument, and Appellant's submission, letters of support and relapse prevention plan.

After considering all required factors and principles, 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 the fact that prior sanctions failed to deter Appellant from committing the instant offenses, that his criminal history includes multiple prior DWI convictions, that prior programs in prison and [REDACTED], and elevated scores in the COMPAS instrument. See Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); 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 v. Herbert, 255 A.D.2d at 914, 680 N.Y.S.2d at 390. 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).

Moreover, the Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to 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); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

Recommendation: Affirm.