December 2020

Administrative Appeal Decision - Wiegert, Gary (2019-03-22)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Wiegert, Gary **Facility:** Cayuga CF

NYSID: [redacted] **Appeal Control No.:** 12-027-18 B

DIN: 96-A-6658

Appearances: Gary Wiegert (96A6658)
Cayuga Correctional Facility
2202 State Route 38A, Box 1186
Moravia, New York 13118

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

Board Member(s) who participated: Alexander, Demosthenes.

Papers considered: Appellant's Brief received December 24, 2018

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** _____
Commissioner

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 3/22/19 GG.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the November 2018 determination of the Board, denying release and imposing a 24-month hold.

Appellant raises the following issues in his brief: (1) the Board's decision was arbitrary and capricious, with too much weight being assigned to the very serious nature of the multiple crimes of conviction involving the sodomy and sexual abuse of Appellant's young sons; (2) the Board did not provide sufficient weight to certain scores contained in Appellant's COMPAS instrument; (3) the Board's decision was made in violation of Appellant's due process rights; (4) the Board's decision was conclusory, lacking sufficient detail; (5) certain records relied upon by the Board contained errors, and other records should have been before the Board at the time of the interview; (6) three, not two, Commissioners are required to conduct a Board interview; (7) the Substance Abuse Subtle Screening Inventory (SASSI) should have been completed prior to the Board interview; (8) the Board was required to provide a record of its deliberations; and (9) Appellant's STATIC-99 risk assessment should have been considered by the Board at the time of the interview and provided greater weight.

As to the first and second issues, 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). "Although these standards are no longer repeated in the [Board's] regulation, this in no way modifies the statutory mandate requiring their application." Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

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). While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477. 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; 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17. 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 McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); 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); People ex rel. Herbert, 97 A.D.2d 128.

In 2011, the law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4); 9 N.Y.C.R.R. §8002.2(a). 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d 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 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. See 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 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). Furthermore, declining to afford the COMPAS controlling weight does not violate the 2011 amendments. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016).

As to the third issue, an inmate has no Constitutional right to be 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

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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). At most, inmates may have "minimal due process rights" that are limited to not being denied parole for constitutionally arbitrary or impermissible reasons, which requires a showing of egregious official conduct. Graziano v. Pataki, 689 F.3d 110 (2d Cir. 2012); accord Bottom v. Pataki, 610 Fed. Appx. 38 (2d Cir. 2015); Borrell v. Superintendent of Wende Corr. Facility, No. 12-CV-6582 CJS MWP, 2014 WL 297348, at *7 (W.D.N.Y. Jan. 27, 2014), appeal dismissed (Oct. 31, 2014). "[D]enial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute." Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008) (citations omitted).

As to the fourth issue, the Board's decision satisfied the criteria set out in Executive Law §259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); 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).

As to the fifth issue, the Board had before it at the time of the interview all required records. It is further noted that at no time during the interview did Appellant raise any issues as to any alleged errors in any records before the Board. 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, 719 N.Y.S. 2d 166 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997).

As to the sixth issue, Appellant's assertion that three commissioners should have conducted the interview is unavailing. 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". Moreover, because Appellant failed to raise an objection to the complained of two member panel at the parole interview, this claim has not been preserved. Vanier v. Travis, 274 A.D.2d 797 (3d Dept. 2000); Matter of Morel v. Travis, 278 A.D.2d 580 (3d Dept. 2000); Flores v. New York State Board of Parole, 210 A.D.2d 555 (3d Dept. 1994).

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As to the seventh issue, the Substance Abuse Subtle Screening Inventory (SASSI) is to be completed upon an inmate's release, and is therefore not before the Board at the time of the interview. This is made clear in the narrative section of the COMPAS instrument under the category of "Reentry Substance Abuse Treatment implications" where it is stated that the SASSI "may" be appropriate "upon release." The provisions of 9 NYCRR §8002.2(a), as amended, allow the Board to consider other risk and need assessments or evaluations ***if*** such assessments or evaluations have been prepared and made available for review at the time of the interview. In addition, while Appellant argues that the COMPAS instrument has limitations requiring consideration of special risk assessments when an inmate presents with a history of sex offenses, there is no requirement that the Board consider additional risk assessments beyond the COMPAS instrument. Matter of McCarthy v. New York State Dep't of Corr. & Cmty. Supervision, Index No. 3664/18, *Decision/Order/Judgment* dated Oct. 18, 2018, at 3 (Sup. Ct. Albany Co.) (Ceresia, S.C.J.).

As to the eighth issue, there is no due process requirement that the internal deliberations or discussions of the Board appear on the record. Matter of Barnes v. New York State Div. of Parole, 53 A.D.3d 1012, 862 N.Y.S.2d 639 (3d Dept. 2008); Matter of Borcsok v. New York State Div. of Parole, 34 A.D.3d 961, 823 N.Y.S.2d 310 (3d Dept. 2006); Matter of Collins v. Hammock, 96 A.D.2d 733, 465 N.Y.S.2d 84 (4th Dept. 1983).

As to the ninth issue, Appellant's STATIC-99 risk assessment instrument was administered on February 28, 2017, with an S-99R score of -2, and a S-99R Risk Category score of "low". The provisions of 9 NYCRR §8002.2(a) allow the Board to consider other risk and need assessments or evaluations when they have been prepared and made available for review at the time of the interview, as was the case with Appellant's Static S-99R assessment instrument. However, as noted above with respect to the COMPAS risk assessment instrument, the results contained in the Static S-99R assessment instrument are additional, and not determinative, considerations that the Board must weigh along with applicable statutory factors when assessing an inmate's suitability for possible release to parole supervision. Finally, as noted above concerning the SASSI, when risk assessments other than the COMPAS instrument (such as the STATIC-99) are presented to the Board at the time of the interview, the Board ***may*** consider such assessments, but is not mandated to do so. see Matter of McCarthy.

Recommendation: Affirm.