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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Lopez, Hector

Facility: Woodbourne CF

NYSID: [REDACTED]

**Appeal
Control No.:** 08-148-18 B

DIN: 77-B-1680

Appearances: Lawrence D. Gold, Esq.
P.O. Box 269
Monticello, New York 12701

Decision appealed: August 2018 decision, denying discretionary release and imposing a hold of 12-months.

Board Member(s)
who participated: Cruse, Berliner, Shapiro

Papers considered: Appellant's Brief received January 18, 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:

 ☒ 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 2/27/19 66.

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the August 2018 determination of the Board, denying release and imposing a 12-month hold.

Appellant raises the following issues in his brief: (1) the Board's decision was arbitrary, capricious and irrational, made in violation of applicable legal authority, and relied too heavily upon the serious nature of Appellant's crime of conviction; (2) Appellant's positive accomplishments, rehabilitative efforts, certain COMPAS scores, improved disciplinary record, educational and therapeutic achievements, remorse and insight, and release plans were not given sufficient consideration by the Board; (3) the Board's decision was conclusory, lacking sufficient detail; (4) the Board's decision was made in violation of Appellant's due process rights under the Constitution; (5) the Board's decision constituted cruel and unusual punishment; (6) the Board's decision was tantamount to a resentencing of Appellant; (7) the Board failed to provide Appellant with guidance as to how to improve his chances for parole in the future; (8) the Board failed to consider Appellant's youth and its attendant circumstances in relationship to the commission of the crime of conviction; and (9) the 12-month hold was excessive.

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

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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, 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

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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 fourth 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 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).

As to the fifth issue, the denial of parole under a statute invoking discretion in parole determinations does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment. Carnes v. Engler, 76 Fed. Appx. 79 (6th Cir. 2003); Lustgarden v. Gunter, 966 F.2d 552, 555 (10th Cir.), cert den, 506 U.S. 1008, 113 S. Ct. 624 (1992), rehearing denied 507 U.S. 955, 113 S. Ct. 1374 (1993); Pacheco v. Pataki, No. 9:07–CV–0850, 2010 WL 3909354, at *3 (N.D.N.Y. Sept. 30, 2010). Appellant’s maximum sentence is life imprisonment. The Board acted within its discretion to hold Appellant for another 12 months, after which he will have the opportunity to reappear before the Board.

As to the sixth issue, Appellant’s assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. See Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). Appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

As to the seventh issue, the Board is not required to state what an inmate should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff’d, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

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As to the eighth issue, the Third Department has held that “[f]or those persons convicted of crimes committed as juveniles [that is, age 17 and under] who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue.” Matter of Hawkins v. New York State Dep’t of Corr. & Cmty. Supervision, 140 A.D.3d 34, 39, 30 N.Y.S.3d 397, 400 (3d Dept. 2016), aff’d in part 51 Misc. 3d 1218(A) (Sup. Ct. Sullivan Co. 2015). After Hawkins, the Board revised its regulations governing parole determinations for minor offenders to require that the Board “consider . . . the diminished culpability of youth,” and “growth and maturity” since the time of the offense. 9 N.Y.C.R.R. §8002.2(c). The transcript of the interview reveals that the Board discussed and considered Appellant’s youth at the time of commission of the Murder 2 offense which carried the Life sentence, the circumstances surrounding the crime of conviction, his release plans, his institutional programming, letters of assurance, that this was his first State bid, the time he has spent in prison, the number of Board interviews he has participated in, his COMPAS risk assessment, his personal growth, his family support, his upbringing, his schooling, his family life at the time of commission of the crime, educational achievements, behavioral issues, his work experience, court challenges, future goals, Case Plan, his need to develop positive activities and to meet with pre-release organizations for reintegration into the community, anger management strategies, [REDACTED], that he has taken responsibility for his crime, his sentencing minutes, religious activities and beliefs, interaction with prison staff, letters concerning his suitability for possible release to parole, disciplinary record, and other factors. The Board therefore conducted the interview in accordance with the requirements set forth in the Hawkins decision.

As to the ninth issue, the Board has discretion to hold an inmate for a period of up to 24 months. 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); Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Therefore, the hold of 12 months was not excessive or improper.

Recommendation: Affirm.