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December 2020

### Administrative Appeal Decision - Zi, John Kojo (2019-01-31)

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Administrative Appeal Decision Notice

**Inmate Name:** Zi, John Kojo

**Facility:** Ogdensburg Correctional Facility

**NYSID No.:** [REDACTED]

**Appeal Control #:** 06-093-18-BMT

**Dept. DIN#:** 17R2358

Appearances:

For the Board, the Appeals Unit

For Appellant:

John Cirando Esq.  
101 South Salina Street  
Suite 1010  
Syracuse, New York 13202


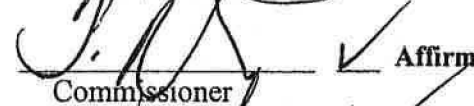
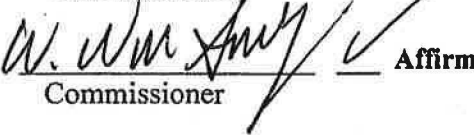
Board Member(s) who participated in appealed from decision: **Berliner, Davis**

Decision appealed from: 6/2018-Denial of Merit Time release.

Pleadings considered: Brief on behalf of the appellant received on October 15, 2018.  
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript,  
Parole Board Release Decision (Form 9026), COMPAS, TAP/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 11/31/19 GG.

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:** Zi, John Kojo

**Facility:** Ogdensburg Correctional Facility

**Dept. DIN#:** 17R2358

**Appeal Control #:** 06-093-18-BMT

**Findings:**

Counsel for the appellant has submitted a brief to serve as the perfected appeal. The brief raises the following issues. 1) appellant claims the Board decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors. 2) appellant contends he has an excellent institutional record and release plan, including an EEC and an overall great COMPAS score, but all the Board did was to look only at the instant offenses. 3) the decision doesn't contain any factual details.

In response, pursuant to Executive Law §259-i(2)(c), the Parole Board must consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record or criminal behavior, giving whatever emphasis they so choose to each factor. In re Garcia v. New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1<sup>st</sup> Dept. 1997); People ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1<sup>st</sup> Dept. 1983). The Board is not required to give equal weight to each statutory factor. Arena v New York State Department of Corrections and Community Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017); Marszalek v Stanford, 152 A.D.3d 773, 59 N.Y.S.3d 432 (2d Dept. 2017); Paniagua v Stanford, 153 A.D.3d 1018, 56 N.Y.S.3d 894 (3d Dept. 2017); Esquilin v New York State Board of Parole, 144 A.D.3d 846, 40 N.Y.S.3d 279 (2<sup>nd</sup> Dept. 2016); Kenefick v Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4<sup>th</sup> Dept. 2016); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4<sup>th</sup> Dept. 2014); Phillips v Dennison, 41 A.D.3d 17, 834 N.Y.S.2d 121 (1<sup>st</sup> Dept. 2007); That an inmate has numerous achievements within a prison's institutional setting does not automatically entitle him to parole release. Matter of Faison v. Travis, 260 A.D.2d 866, 688 N.Y.S.2d 782 (3d Dept. 1999); Pulliam v Dennison, 38 A.D.3d 963, 832 N.Y.S.2d 304 (3d Dept. 2007). Moreover, per Executive Law §259-i(2)(c), an application for parole release shall not be granted merely as a reward for appellant's good conduct or achievements while incarcerated. Larrier v New York State Board of Parole Appeals Unit, 283 A.D.2d 700, 723 N.Y.S.2d 902, 903 (3d Dept 2001); Vasquez v State of New York Executive Department, Division of Parole, 20 A.D.3d 668, 797 N.Y.S.2d 655 (3d Dept. 2005); Wellman v Dennison, 23 A.D.3d 974, 805 N.Y.S.2d 159 (3d Dept. 2005).

Appellant's release plans are deficient in that they are not concrete, comprehensive, or supportive for successful reintegration into the community. Executive Law 259-i(c)(1) clearly confers discretion upon the parole board as to whether and, if release is granted, when to release an inmate. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014).

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**Findings:** (continued from page 1)

The Board may place particular emphasis upon the nature of the offenses. Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). The Board in its discretion properly placed greater emphasis on the present offenses, as it is not required to give equal weight to all requisite factors. Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016); Peralta v New York State Board of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018).

The Board is empowered to deny parole where it concludes release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering lack of insight. Silmon v Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704, 708 (2000). The Board may consider the lack of insight. Crawford v New York State Board of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016).

The Board set forth in adequate detail the reasons for its denial of the inmate's request for release. Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013). The written Board decision in this case contains sufficient detail. McLain v New York State Division of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept 1994); Walker v Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept 1991), appeal dismissed 79 N.Y.2d 897, 581 N.Y.S.2d 660 (1992); Thomas v Superintendent of Arthur Kill Correctional Facility, 124 A.D.2d 848, 508 N.Y.S.2d 564 (2d Dept 1986), appeal dismissed 69 N.Y.2d 611, 517 N.Y.S.2d 1025 (1987); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4<sup>th</sup> Dept. 2014); Betancourt v Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Robinson v New York State Board of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Applegate v New York State Board of Parole, 164 A.D.3d 996, 82 N.Y.S.3d 240 (3d Dept. 2018).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013).

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**Findings:** (continued from page 2)

As for the receipt of an EEC, appellant is not entitled to release, provided the Board considers the statutory factors and articulates its reasons for denying discretionary release. White v Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006); Larmon v Travis, 14 A.D.3d 960, 787 N.Y.S.2d 918 (3d Dept. 2005). Receipt of an EEC does not preclude consideration of instant offense or criminal history. Richards v Travis, 288 A.D.2d 604, 732 N.Y.S.2d 465 (3d Dept 2001), or the serious and violent nature of the crime. Fuller v New York State Board of Parole, 284 A.D.2d 853, 726 N.Y.S.2d 600 (3d Dept. 2001). The Board still possesses the discretion to determine whether the parole candidate has met the statutory criteria and deserves release. Barad v New York State Board of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), leave to appeal denied 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001); Matter of Rhoden v. New York State Div. of Parole, 270 A.D.2d 550, 704 N.Y.S. 521 (3d Dept. 2000); Heitman v. New York State Board of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 583 N.Y.S.2d 502 (2d Dept. 1992). The Parole Board may deny release to parole on a finding that "there is a reasonable probability that, if ... 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". 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 897, 581 N.Y.S.2d 660 (1992); Morrero v Dennison, 19 A.D.3d 960, 797 N.Y.S.2d 638 (3d Dept. 2005); Matter of Ramahlo v Travis, 290 A.D.2d 911, 737 N.Y.S.2d 160, 161 (3d Dept. 2002); Marcelin v Travis, 262 A.D.2d 836, 693 N.Y.S.2d 639 (3d Dept. 1999); Nieves v New York State Division of Parole, 251 A.D.2d 836, 675 N.Y.S.2d 158 (3d Dept. 1998). The facts listed in the decision do rebut the presumption and permit a denial of early release.

A positive COMPAS score does not create any guarantee to release, but rather is only one factor considered by the Board in exercising its discretion when making a parole determination. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014); Dawes v Beale, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); Byas v Fischer, 120 A.D.3d 1586, 992 N.Y.S.2d 813 (4<sup>th</sup> Dept. 2014); Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016).

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**Findings:** (continued from page 3)

Notably, the 2011 amendments to the Executive Law did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole, namely (1) whether “there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law”; (2) whether release “is not incompatible with the welfare of society”; and (3) whether release “will not so deprecate the seriousness of his crime as to undermine respect for law.” See Executive Law § 259-i(2)(c)(A). Even uniformly low COMPAS scores and other evidence of rehabilitation would not resolve the broader questions of society’s welfare, public perceptions of the seriousness of a crime, or whether release would undermine respect for the law. Thus the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. *Matter of King v Stanford*, No. 521324, 2016 N.Y. App. Div. LEXIS 1732 (3d Dep’t Mar. 10, 2016); *Furman v Annucci*, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016). The COMPAS is an additional consideration that the Board must weigh along with the statutory factors for 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 (3d Dep’t 2014); accord *Matter of Dawes v. Annucci*, 122 A.D.3d 1059, 1061 (3d Dep’t 2014).

Since the Board's decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole, it satisfied the criteria set out in section 259-i of the Executive Law. *Siao-Pao v Dennison*, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (Ct. App. 2008); *Matter of Whitehead v. Russi*, 201 A.D.2d 825, 607 N.Y.S.2d 751 (3d Dept. 1993); *Matter of Green v. New York State Division of Parole*, 199 A.D.2d 677, 605 N.Y.S.2d 148 (3d Dept. 1993). Moreover, the reasons stated by the Parole Board members for holding appellant are sufficient grounds to support their decision. *People ex rel. Yates v. Walters*, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); *Matter of Ganci v Hammock*, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2d Dept. 1984); *Matter of Vuksanaj v. Hammock*, 93 A.D.2d 958, 463 N.Y.S.2d 61 (3d Dept. 1983); *Matter of Pina v. Hammock*, 89 A.D.2d 799, 453 N.Y.S.2d 479 (4<sup>th</sup> Dept. 1982). Since the Board's challenged decision was made in accordance with the pertinent statutory requirements, it exercised proper discretion in denying appellant early release on parole. *In the Matter of Hawkins v. Travis*, 259 A.D.2d 813, 686 N.Y.S.2d 198 (3d Dept. 1999), *app. dism.* 93 N.Y.2d 1033, 697 N.Y.S.2d 556 (1999); *Matter of Barrett v. New York State Division of Parole*, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

**Recommendation:**

Accordingly, it is recommended the decision of the Board be affirmed.