December 2020

Administrative Appeal Decision - Maher, John (2019-05-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Maher, John **Facility:** Attica CF

NYSID: [redacted] **Appeal Control No.:** 10-130-18 B

DIN: 96-A-1673

Appearances: John Maher, 96-A-1673
Attica C.F.
639 Exchange Street
Attica, New York 14011-0149

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

Board Member(s) who participated: **Cruse, Demosthenes**

Papers considered: Appellant's Brief received February 20, 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 5/10/19 GG.

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: Maher, John **DIN:** 96-A-1673

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Appellant was sentenced to 25 to 50 years upon his conviction of Attempted Murder in the second degree (two counts), Assault in the first degree (two counts), Assault in the second degree, and Robbery in the third degree. The convictions stem from an incident involving his parents and a female acquaintance that took place while Appellant was on parole. In the instant appeal, Appellant challenges the September 2018 determination of the Board denying release after his initial interview and imposing a 24-month hold on the following grounds: (1) the Board failed to consider the wishes of his parents, who recommended a lesser sentence as reflected in the pre-sentence investigation report and support his release; (2) the Board failed to consider the District Attorney's sentencing recommendation; (3) the Board ignored his achievements and relied on a mistaken interpretation of his file insofar as the Board characterized his institutional adjustment as marginal; (4) the Board mistakenly characterized his adjustment while on parole as marginal; [redacted] and (6) the 24-month hold was excessive.

As an initial matter, 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). 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, 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); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). 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 McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990).

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APPEALS UNIT FINDINGS & RECOMMENDATION

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant, after a night of drinking, possible cocaine use and claimed head trauma, assaulted with a hammer a female companion who returned to his home and stabbed, punched and struck with a shovel his parents when they attempted to intervene after which he fled the scene and stole a car; Appellant's criminal history featuring an array of offenses commencing at age 18, violation of probation, and parole status at the time of the instant offense; [redacted] and discipline including Tier IIIs for contraband and drug use; [redacted] and find work as a tree surgeon or electronic technician. The Board also had before it and considered, among other things, the pre-sentence investigation report, the sentencing minutes, an official D.A. letter, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet.

After considering all required factors and principles, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the serious instant offense, Appellant's criminal history and failures on community supervision indicating disregard for the law, disregard for the safety of others and crimes while at liberty and confined, Appellant's Tier III infractions, [redacted]

The Board considered all required documents, including the pre-sentence investigation report and the sentencing minutes. That the Board did not give controlling weight to the sentencing recommendation of Appellant's parents was not improper, as the weight to be accorded each factor is within the Board's discretion. Matter of Delacruz, 122 A.D.3d 1413, 997 N.Y.S.2d 872. In addition, the suggestion that the District Attorney made a favorable sentencing recommendation is unsupported. Rather, the minutes reflect the District Attorney advocated for the maximum allowed - 12 ½ to 25 years - for the crime of Attempted Murder in the second degree alone and recommended that Appellant "should be kept away from society for as long as possible" (Mins. at 17). The court, in turn, agreed Appellant was a danger and imposed two consecutive sentences of 12 ½ to 25 years for each count of Attempted Murder.

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Contrary to Appellant's claim, the Board's characterization of Appellant's institutional adjustment as "marginal" has record support. The Board credited his program achievements but correctly noted his institutional adjustment included Tier III infractions for drug use and contraband – more than once and with SHU time – [redacted] While Appellant attributes his program difficulty to a hearing problem, the Board was entitled to rely on the official record. See Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011).

Similarly, the Board's characterization of Appellant's adjustment on parole – in addition to a prior term of probation – as "poor" is supported by his commission of the instant offense while on parole. During the interview, the Board acknowledged the record indicates he was making a positive adjustment following his most recent release on parole but pointed out that, after a night of drinking and possible cocaine use, he committed the instant offense.

As for Appellant's objection to his COMPAS reentry substance abuse score, the Board does not determine COMPAS scores and an administrative appeal before the Board is not the proper forum to challenge the COMPAS instrument. Moreover, the Board's reliance on the score was reasonable in view of Appellant's alcohol and possible drug use prior to the instant offense wherein he nearly killed people. See Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017). While Appellant argues alcohol was a "secondary factor," his alcohol use that night is undisputed and he acknowledged during the interview that alcohol was a critical element of his behavior. The Board also was entitled to rely on the pre-sentence investigation report, Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011), and the court's characterization of the crime, Matter of Platten v. New York State Bd. of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017).

Finally, 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.