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December 2020

### Administrative Appeal Decision - Herrle, Jon (2019-02-27)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Herrle, Jon

Facility: Greene C.F.

NYSID: [REDACTED]

Appeal Control No.: 07-082-18B

DIN: 18-B-0996

Appearances: Christina Myers, Esq.  
Greene County Public Defender  
Greene County Office Building  
411 Main Street, 2nd Floor  
Catskill, New York 12414

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

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

Papers considered: Appellant's Brief received December 26, 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.

Final Determination: The undersigned determine that the decision appealed is hereby:

[Signature] Affirmed  Vacated, remanded for de novo interview  Modified to

Commissioner

[Signature] Affirmed  Vacated, remanded for de novo interview  Modified to

Commissioner

[Signature] 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.

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Herrle, Jon

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Appellant was sentenced to one year, four months to four years upon his conviction by plea of Manslaughter in the second degree. He was received into DOCCS custody on April 13, 2018. In the instant appeal, Appellant challenges the June 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the decision is arbitrary and capricious because the Board relied on the instant offense and criminal history, in the absence of aggravating circumstances, without adequate consideration of other factors such as his rehabilitative efforts and exemplary discipline; (2) the Board thereby usurped the role of the sentencing court and failed to comply with Executive Law § 259-c(4); (3) the decision was unfair because the COMPAS instrument did not accurately represent Appellant; (4) the decision was conclusory; and (5) the 24-month hold was excessive. These arguments are without merit.

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). 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant caused his intoxicated girlfriend’s death by giving her crushed opiate pills and telling her the drug was cocaine to

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persuade her to take it after which he fled the house and convinced a friend to check on her; Appellant's expressions of remorse; his criminal history including prior alcohol related offenses; his long history of substance abuse; his institutional record including reception status; [REDACTED], have SSD benefits reinstated and possibly work part-time. The Board also had before it and considered, among other things, the sentencing minutes, the Parole Board Report, and the COMPAS instrument.

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 Appellant's carelessness and deception causing the loss of the victim's life, his prior convictions 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. In addition, the Board permissibly relied on [REDACTED] that clouded his judgment and lack of insight regarding his use. See Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Sanchez v. Dennison, 21 A.D.3d 1249, 801 N.Y.S.2d 423 (3d Dept. 2005); Matter of Connelly v. New York State Div. of Parole, 286 A.D.2d 792, 729 N.Y.S.2d 808, 809 (3d Dept.), appeal dismissed 97 N.Y.2d 677, 738 N.Y.S.2d 291 (2001). The Board encouraged him to enter and complete [REDACTED] and other programs and to obtain letters of support that will assist him with transition into the community. See Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997). While the Board may place greater weight on the nature of the offense without the existence of aggravating factors, Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714, the Board relied on additional considerations here.

Appellant's assertion that the Board usurped the role of the sentencing court 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. 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). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007).

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Appellant’s additional contention that the Board failed to comply with section 259-c(4) of the Executive Law is likewise without merit. In 2011, the Executive 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). 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). However, 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. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory 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). That is exactly what happened here.

Appellant objects that the COMPAS instrument does not accurately represent him, arguing the abscond score is “over-inflated” based on the circumstances of a prior incident, the low family support score is unfair because he has support from his “very few” living family members in MA and OH, and the score for criminal involvement is based on several incidents for which he is remorseful and attended domestic violence programs after which he remained trouble free for 11 years. He also addresses scores for reentry substance abuse and negative social cognitions, expressing a willingness to engage in programming, “cognitive restructuring” and case management upon release. To the extent he seeks to challenge the COMPAS, the Board does not determine COMPAS scores and an administrative appeal before the Board is not the proper forum to challenge the COMPAS instrument. Furthermore, the information presented does not render the decision irrational “bordering on impropriety” or otherwise provide a basis to disturb the decision. See Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)).

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

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(3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations: namely, Appellant's criminal record, elevated COMPAS scores, his history of substance abuse and lack of insight, his need to complete recommended programs, and his need to further develop his release plans by obtaining letters of support. The Board is not required to mention each factor in the decision. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315; Matter of Dolan v. New York State Bd. of Parole, 122 A.D.3d 1058, 1059, 995 N.Y.S.2d 850, 852 (3d Dept. 2014), lv. denied, 24 N.Y.3d 915, 4 N.Y.S.3d 601 (2015).

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.