December 2020

Administrative Appeal Decision - Rosado, Jose (2019-03-11)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Rosado, Jose **Facility:** Adirondack CF

NYSID: [redacted] **Appeal Control No.:** 07-143-18 B

DIN: 16-R-0708

Appearances: Ann Connor, Esq.
Livingston County Public Defender's Office
6 Court Street, Room 109
Geneseo, New York 14454-1043

Decision appealed: June 2018 Denial of Discretionary Release with a Hold to the M.E. Date.

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

Papers considered: Appellant's Letter-brief received January 3, 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:

_____ Commissioner — ✓ **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** _____

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 3/11/19 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

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Appellant was sentenced to one year, four months to four years upon his conviction by plea of Sex Offender Registration Violation Second Offense after he failed to give notice that he moved into a new residence with minor children. Appellant waived his June 2018 interview before the Board. In the instant appeal, Appellant challenges the June 2018 determination of the Board denying discretionary release with a hold to the M.E. date on the following grounds: (1) Appellant understood he was not required to attend the interview; (2) the decision is arbitrary and capricious because the Board relied on Appellant's criminal history without properly considering all other required factors and giving favorable consideration to his receipt of an EEC; and (3) Appellant completed the COMPAS instrument contrary to the Board's decision. These arguments are without merit.

Executive Law article 12-B establishes the procedure the Board must follow, and the criteria to be considered, in determining whether to grant an inmate discretionary release on parole. Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, --N.Y.S.3d-- (3d Dept. 2018). The Board conducts a parole release interview as part of its inquiry into the inmate's suitability for release. Executive Law § 259-i(2)(a). Where an inmate waives the interview, the Board conducts its release consideration *in absentia* and makes its determination based solely on its review of the record without the benefit of an interview. That is what occurred here. Appellant signed a waiver of appearance confirming his understanding "that the Parole Board will make a determination regarding my possible release to community supervision in my absence."

Pursuant to Executive Law § 259-i(2)(c)(A), 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 factors which are 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). An EEC does not automatically entitle an inmate to discretionary release or eliminate consideration of the statutory factors including the instant offense. Matter of Corley v. New York State Div. of Parole, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818 (3d Dept. 2006); Matter of Pearl v. New York State Div. of Parole, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817 (3d Dept. 2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006). The Board may deny release to parole on a finding that there is a reasonable probability that, if such inmate is released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible

APPEALS UNIT FINDINGS & RECOMMENDATION

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with the welfare of society. Correction Law § 805; Matter of Heitman v. New York State Bd. 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, 771, 583 N.Y.S.2d 502, 503 (2d Dept. 1992); 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 89 7, 581 N.Y.S.2d 660 (1992).

While consideration of the statutory 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).

That the Board did not mention every statutory factor in its decision – and enumerate his specific programs – does not constitute convincing evidence that the Board did not consider them. Matter of Dolan v. New York State Bd. of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014), lv. denied, 24 N.Y.3d 915, 4 N.Y.S.3d 601 (2015); Matter of Morel v. Travis, 18 A.D.3d 930, 793 N.Y.S.2d 920 (3d Dept. 2005). The Board is not required to address each factor considered in its decision much less enumerate every aspect of an institutional record. See Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315; 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).

The Board considered the applicable principles and factors based upon a review of the record, which included, among other things, the pre-sentence investigation report, the sentencing minutes, an official DA statement, the Parole Board Report, and Appellant's case plan. Thereafter, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. In reaching its conclusion, the Board permissibly relied on the instant offense and Appellant's criminal history including other sex-offender convictions along with failure on community supervision. The Board acknowledged Appellant's receipt of an EEC – and programming – but the EEC did not preclude the Board from considering and placing greater emphasis on his criminal record. See, e.g., Matter of Bello v. Bd. of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017); Matter of Berry v. New York State Div. of Parole, 50 A.D.3d 1346, 855 N.Y.S.2d

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310 (3d Dept. 2008). In addition, the Board cited the fact that Appellant's COMPAS instrument is incomplete because he refused to complete it. See generally Executive Law § 259–c(4); Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014). While Appellant claims without support that he completed the COMPAS, the record reveals he signed a form indicating his refusal and the COMPAS is incomplete.

Accordingly, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." 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)).

Recommendation: Affirm.