December 2020

Administrative Appeal Decision - Gadsen, Kendel (2019-02-27)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name:	Gadsen, Kendel	**Facility:**	Watertown CF
NYSID:	[redacted]	**Appeal Control No.:**	10-187-18 B
DIN:	18-R-1312		

Appearances: Kendel Gadsen, 18-R-1312
Watertown CF
23147 Swan Road
Watertown, NY 13601-9340

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

Board Member(s) who participated: **Davis, Berliner**

Papers considered: Appellant's Letter-brief received October 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, 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.

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: Gadsen, Kendel **DIN:** 18-R-1312

Facility: Watertown CF **AC No.:** 10-187-18 B

Findings: (Page 1 of 3)

Appellant was sentenced to an aggregate term of one year, four months to four years upon his conviction of Aggravated Criminal Contempt and Criminal Contempt in the first degree, with a concurrent one year sentence for a misdemeanor conviction of Criminal Contempt in the second degree. In the instant appeal, Appellant challenges the October 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the Board's conclusion that there is a reasonable probability he would not live at liberty without again violating the law is unsupported because he has no prior felony convictions, he is 23 y.o. [redacted]; (2) he exercised bad judgment because he was young and inexperienced with women; (3) he did not complete required programs through no fault of his own; and (4) the decision is 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 offenses wherein Appellant physically assaulted his ex-girlfriend and repeatedly contacted her in violation of an order of protection, which Appellant

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Gadsen, Kendel **DIN:** 18-R-1312

Facility: Watertown CF **AC No.:** 10-187-18 B

Findings: (Page 2 of 3)

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attributed to being immature and errors on both their parts; Appellant's criminal history; his institutional record including vocational programming, need to complete programs such as ART, and clean discipline; and release plans to work in construction and [redacted]. As the Board noted during the interview, it had no letters of support/assurance, or any documented release plans outlining his plans. The Board did have before it and considered, among other things, the Parole Board Report, an official DA statement, Appellant's case plan, 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 behavior in repeatedly endangering the victim's welfare by assaulting her and failing to comply with court orders of protection to stay away from her and the COMPAS instrument's elevated risk score for felony violence. See, e.g., Executive Law §§ 259–c(4), 259-i(2)(c)(A); Matter of Robinson v. New York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of Freeman v. Fischer, 118 A.D.3d 1438, 988 N.Y.S.2d 780 (4th Dept. 2014); Matter of Montane v. Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept. 2014). In addition, the Board encouraged him to complete all recommended programs and create a documented release plan. See, e.g., Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

That Appellant has no prior felony convictions, he is 23 y.o. and [redacted] does not render the decision 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)). The weight to be given each applicable factor is within the Board's discretion. Matter of Delacruz, 122 A.D.3d 1413, 997 N.Y.S.2d 872. As for Appellant's claim that he exercised bad judgment because he was young and inexperienced, he had the opportunity to address his offenses during the interview and his perception of his behavior does not provide a basis to disturb the decision. Moreover, the Board may consider an inmate's need to complete rehabilitative programming even where a delay in commencement is through no fault of the inmate. See Matter of Barrett, 242 A.D.2d 763, 661 N.Y.S.2d 857. We note Appellant agreed during the interview that he would benefit from ART.

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

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Facility: Watertown CF **AC No.:** 10-187-18 B

Findings: (Page 3 of 3)

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has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

Recommendation: Affirm.