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Administrative Appeal Decision - Femminella, Lawrence (2019-06-06)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Femminella, Lawrence Facility: Washington CF
NYSID: [REDACTED] Appeal Control No.: 03-087-19 B
DIN: 13-A-0469

Appearances: Lawrence Femminella 13A0469
Washington Correctional Facility
P.O. Box 180
72 Lock 11 Lane
Comstock, New York 12821

Decision appealed: February 2019 decision, denying discretionary release and imposing a hold to ME date.

Board Member(s) who participated: Cruse, Demosthenes

Papers considered: Appellant's Letter-brief received March 29, 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:

[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 6/6/19 66.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Femminella, Lawrence

DIN: 13-A-0469

Facility: Washington CF

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Appellant challenges the February 2019 determination of the Board, denying release and imposing a to ME date hold. Appellant is serving time for two different instant offenses. In one crime he pickpocketed the victim and took an i-phone, and a wallet which contained a credit card. In the other crime he burglarized three different apartment buildings. Appellant raises the following claims: 1) his LCTI denial by DOCCS was on appeal at the time of the interview, and was later reversed, such that this negative information at the time influenced the Board decision; and 2) the decision contains erroneous information in that he is only serving a determinate sentence right now, so this is CR release, and not discretionary release, being reviewed.

As a preliminary matter, appellant refused to appear for the interview. If the inmate refuses to attend, then he has failed to preserve any procedural challenges to the manner in which the proceeding was conducted. Shaw v Fischer, 126 A.D.3d 1533, 4 N.Y.S.3d 568 (4th Dept. 2015). So the entire appeal is dismissed as being moot.

In any event, as to the first issue, appellant made no request to postpone his interview due to the pending appeal of his LCTI qualification denial with DOCCS. By way of analogy, it is not improper for the Board to consider a DOCS prison disciplinary finding against the appellant, even if the case is pending on appeal at the time of the Parole Board Release Interview. Matter of Arce v Travis, 273 A.D.2d 564, 710 N.Y.S.2d 554. (3d Dept 2000). Appellant is not automatically entitled to a new parole release interview due to the subsequent reversal of a DOCS disciplinary hearing. Matter of Collins v. Hammock, 52 N.Y.2d 798, 436 N.Y.S.2d 704 (1980). And, the fact that appellant has, subsequent to this Board decision, lost some of his CR time, shows the interview was not for naught.

That the term for one of the instant offenses has expired does not mean he has completed that sentence. Per Penal Law 70.30(1)(a) all maximums of concurrent multiple indeterminate sentences merge and are satisfied by the discharge of the term which has the longest unexpired term to run. People v Buss, 11 N.Y.3d 553; Lynch v Smith, 123 A.D.3d 1279, 999 N.Y.S.2d 219 (3d Dept. 2014). Per Penal Law §70.30(1)(b), the minimum and maximum sentences of the two indeterminate consecutive sentences are added to form aggregate minimum and aggregate maximum wholes. Thus, per Executive Law S259-i(3)(d)(iii), an inmate's eligibility for parole release and appearance before the Board are governed by the legal requirements of the new indeterminate sentence. Santiago v Alexander, 80 A.D.3d 1105, 916 N.Y.S.2d 529 (3d Dept. 2011). Per Penal Law 70.30(1), concurrent sentences and consecutive sentences yield single sentences, either by merger when concurrent, or by addition when consecutive, and they then aggregate into a single sentence. People v Brinson, 90 A.D.3d 670, 933 N.Y.S.2d 728 (3d Dept. 2011), Charles v New York State Department of Correctional Services, 96 A.D.3d 1341, 948 N.Y.S.2d 172 (3d Dept. 2012); Baez v Superintendent Queensboro Correctional Facility, 127 A.D.3d 110, 5 N.Y.S.3d 216 (2d Dept. 2015). Thus, NYSDOCCS aggregates the sentences into a

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single, combined sentence, and the inmate is not sequentially completing his punishment for each particular conviction. People v Almestica, 97 A.D.3d 834, 949 N.Y.S.2d 425 (2d Dept. 2012). Per Penal law 70.30(1)(b), the inmate is subject to all the sentences that make up the merged or aggregate sentence he is serving, and the Parole Board may consider the facts of those crimes for those sentences that would have otherwise expired if not for the merger. Dawes v Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014).

Recommendation: Affirm.