December 2020

Administrative Appeal Decision - Staropoli, Mark (2019-06-28)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Staropoli, Mark **Facility:** Woodbourne CF

NYSID: [redacted] **Appeal Control No.:** 09-171-18 B

DIN: 08-A-1665

Appearances: Elizabeth Sack Felber, Esq.
The Legal Aid Society
199 Water Street
New York, New York 10038

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

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

Papers considered: Appellant's Brief received March 12, 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 6/25/19 cc.

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: Staropoli, Mark **DIN:** 08-A-1665

Facility: Woodbourne CF **AC No.:** 09-171-18 B

Findings: (Page 1 of 7)

Appellant was sentenced to six years, eight months to 20 years upon his conviction of Rape in the third degree (five counts) and Criminal Sex Acts in the third degree (16 counts). In the instant appeal, Appellant, through counsel, challenges the September 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the Board unlawfully focused on the instant offenses and his behavior at trial without adequately considering and properly weighing his institutional accomplishments, release plans, post-arrest activities and lack of a prior criminal record, in contravention of Executive Law § 259-i and the intent of the 2011 amendments; (2) the Board disregarded his positive COMPAS instrument and departed from it for improper reasons; (3) the Board failed to rebut the presumption of release created by his receipt of an EEC; (4) the Board appeared to rely heavily on incorrect information in the pre-sentence investigation report and the COMPAS, creating the risk that it relied on incorrect information in denying release; (5) the Board was biased due to the instant offenses and harassed, badgered and effectively resentenced Appellant; and (6) the Board denied Appellant parole for asserting his Constitutional right to a trial. These arguments are without merit.

Generally, discretionary release to parole is not to be granted unless the Board determines that an inmate meets three standards: "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). The Board must consider factors relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. Executive Law § 259-i(2)(c)(A). Whereas here the inmate has received an EEC, 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 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 (1st 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). An EEC does not "mandate" or automatically guarantee release, nor does it 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).

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); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Corley, 33 A.D.3d at 1143, 822 N.Y.S.2d at 818. 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 McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); 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 involving sexual contact with a minor over an extended period of time and post-arrest behavior prior to confinement; Appellant's NJ convictions for sexual contact with the same victim and witness tampering; the absence of other convictions; his institutional record including completion of the sex offender program, receipt of an EEC, and clean discipline; and a NJ detainer and that, while Appellant had reentry support and offers, he would be going to NJ if released to serve time owed with what he deemed "a lot of unknowns" as to what would happen once paroled. The Board also had before it and considered, among other things, the amended pre-sentence investigation report, sentencing minutes, official statements from the District Attorney and Appellant's trial attorney, the Parole Board Report, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet. In addition, Appellant was given the opportunity to raise additional matters during the interview.

That the Board focused on what Appellant learned from the sex offender program during the interview without similar inquiry into every other aspect of his institutional record does not constitute convincing evidence that the Board did not consider it. And that the Board indicated his family support was a positive reflection of who he was and not also who he is now does not demonstrate the Board did not review his parole packet, which was addressed several times during the interview. Similarly, that the Board momentarily forgot his daughters are no longer minors does not signify a lack of consideration of the packet. There is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992).

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Staropoli, Mark **DIN:** 08-A-1665

Facility: Woodbourne CF **AC No.:** 09-171-18 B

Findings: (Page 3 of 7)

After considering all required factors and principles, 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 Appellant's course of conduct in the instant offenses wherein he took advantage of his position of trust as the victim's soccer coach *and* as the father of her friend and Appellant's limited insight insofar as he was unable or reluctant to recognize the start of his attraction with the victim, *i.e.*, the grooming period. See Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002). That the Board – after considering the full record and interview – ultimately concluded the instant offense and his limited insight warranted denying parole does not amount to bias. See Matter of Garcia, 239 A.D.2d at 240, 657 N.Y.S.2d at 418-19.

The 2011 amendments to the Executive Law require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). Appellant's suggestion that the amendments represented a fundamental shift in the legal regime governing parole determinations requiring a future-looking focus is not supported by the language of the statute itself, considering the relatively modest change to section 259-c(4) and the absence of any substantive change to section 259-i(2), which governs the discretionary release consideration process. The Board still must 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 v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014). Thus, even where the First Department has "take[n] the unusual step of affirming the annulment of a decision of [the Board]," it has nonetheless reiterated that "[t]he Board is not obligated to refer to each factor, or to give every factor equal weight" and rejected any requirement that the Board prioritize "factors which emphasize forward thinking and planning over the other statutory factors." Matter of Rossakis v. New York State Bd. of Parole, 146 A.D.3d 22, 29 (1st Dept. 2016); see also Matter of Partee v. Evans, 40 Misc. 3d 896, 908, 984 N.Y.S.2d 894, 742 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept.), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

The Board satisfies section 259-c(4) in part by using the COMPAS instrument. Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870; 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). This is encompassed in the Board's regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs

information from a variety of sources, including the statutory factors and the interview.[1] Thus, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the 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).

This is exactly what occurred here. The Board considered Appellant's COMPAS instrument but disagreed with the low risk scores indicated therein as it is entitled to do. The COMPAS does not (and cannot) supersede the Board's authority to determine, based on members' independent judgment and application of section 259-i(2)(c)(A)'s factors, whether an inmate should be released. See 2011 N.Y. Laws ch. 62, § 1, part C, § 1, subpart A, § 1; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. The Board's disagreement with a COMPAS does not amount to bias. Moreover, the amended regulation, 9 N.Y.C.R.R. § 8002.2(a), enacted by the Board – not the Legislature – does not impose a burden of proof on the Board requiring an evidentiary showing when a decision to deny release is impacted by a departure from a COMPAS scale. Rather, the amended regulation was intended to increase transparency if and when that occurs by providing an explanation. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. The Board's explanation here – namely, its concern about Appellant's course of conduct and limited insight into his behavior – satisfied the Board's regulation. Comments made during the interview do not render the decision invalid.

In addition, Appellant's receipt of an EEC did not preclude the Board from considering and placing greater emphasis on the serious nature of his crime together with his limited insight. See, e.g., Matter of Beodeker, 164 A.D.3d 1555, 82 N.Y.S.3d 669; Matter of Furman v. Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016). The Board acted within its discretion in determining these considerations rebutted any presumption created by the EEC and rendered discretionary release inappropriate at this time. See generally Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017); Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015); Matter of Singh v. Evans, 107 A.D.3d 1274, 1275, 968 N.Y.S.2d 648, 649-50 (3d Dept. 2013). Unlike Matter of Wallman v. Travis, 18 A.D.3d 304, 794 N.Y.S.2d 381 (1st Dept. 2005), the Board considered the appropriate factors and its determination – including as to insight – is supported by the record. See Matter of Romer v. Dennison, 24 A.D.3d 866, 804 N.Y.S.2d 872 (3d Dept. 2005). While Appellant disputes there was a grooming period, there is record support as discussed below.

[1] The COMPAS scales are based on a comparison to a norm group composed of the offender population as a whole and are not an absolute indication of an inmate's risk.

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Staropoli, Mark **DIN:** 08-A-1665

Facility: Woodbourne CF **AC No.:** 09-171-18 B

Findings: (Page 5 of 7)

Insofar as Appellant continues to challenge his pre-sentence investigation report, the Board committed no error by considering the current version when he appeared. The Board is mandated to consider the pre-sentence investigation report and entitled to rely on the information contained therein. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). Any challenge to the report must be made to the original sentencing court. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016). Similarly, the Board committed no error considering other official reports such as the Parole Board Report that relied on the amended pre-sentence investigation report. See Matter of Silmon v. Travis, 95 N.Y.2d at 474, 477, 718 N.Y.S.2d at 706, 708.

Nonetheless, Appellant's dispute concerning the timeframe during which the victim was on the soccer team he coached – which he addressed during the interview after having agreed the records were correct – is irrelevant because this detail did not impact the Board's determination. See Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017); Matter of Khatib v. New York State Bd. of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014); Matter of Restivo v. New York State Bd. of Parole, 70 A.D.3d 1096, 895 N.Y.S.2d 555 (3d Dept. 2010). Rather, the decision – like the transcript – reflects the Board was concerned that Appellant took advantage of his position of trust as *both* "the victim's soccer coach and as the father of her friend." This is supported not only by the amended pre-sentence investigation report but also by the sentencing court's comments in the sentencing minutes, upon which the Board was entitled to rely. Matter of Platten v. New York State Bd. of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017). In addition, Appellant acknowledged the victim – a minor – was a friend of his daughter who attended events with his family and he interacted with during her frequent visits to their home. He also acknowledged the victim attended camps and clinics he ran as well as international trips he was on, he was her coach at some point and he had sexual relations with her while he was involved with her in the area of soccer. The Board's concern that Appellant abused the trust placed in him was rational. See, e.g., Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); Matter of Bockeno v. New York State Parole Bd., 227 A.D.2d 751, 642 N.Y.S.2d 97 (3d Dept. 1996). Appellant argues the disputed information about the team resulted in the Board's incorrect perception that he groomed the victim and contends this was simply a crime of opportunity which, during the interview, he attributed to marital problems. However, the Board's grooming observation is supported by other aspects of the record.

As for an alleged error in the COMPAS instrument concerning the nature of the sex offense, an administrative appeal to the Board is not the proper forum to challenge a COMPAS instrument. Moreover, Appellant failed to address the purported error during the interview. But Appellant

acknowledges the alleged error did not impact the COMPAS scores, and there is no evidence it meaningfully affected the Board's determination. Thus, there is no basis to disturb the decision. See Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017); Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017).

The transcript as a whole does not support Appellant's contention that the parole interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). The record does not establish an alleged bias or that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Grune v. Board of Parole,41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007). While Appellant attempts to attribute malfeasance to the Board by labeling interview questions as, for example, callous, accusatory, angry, and aggressive, a review of the transcript reflects the Board properly carried out its obligation to evaluate Appellant's rehabilitative progress and fitness for parole release, including through discussion of the instant offense and Appellant's remorse and insight into his behavior. For example, the Board's inquiry into and consideration of Appellant's grooming the victim – which, as indicated, is supported by the record – was not improper. Appellant's apparent perception that he was not given enough praise does not render the interview unfair.[2] In addition, the Board's desire to ensure there was no need for a postponement and to limit discussion of disputed details that would not impact its decision was reasonable. In short, the Board was not "hostile, berating, and dismissive."

There also is no evidence the Board's decision was predetermined. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000). The acknowledgement that Appellant's receipt of an EEC was a rebuttable presumption of release "but" positive for him – in other words, that the EEC is not dispositive but is a favorable consideration – hardly establishes a decision had been made. Appellant's additional assertion that the denial of parole release amounted to an unauthorized resentencing is without merit inasmuch as the Board

[2] Because the Board inquired whether Appellant has had any contact with the victim and knows what she is doing, the appeal also points to the victim's subsequent achievements based on a google search in an apparent attempt to minimize Appellant's criminal behavior. Any suggestion that a victim's achievements means she was not harmed and somehow undermines a parole denial is mistaken.

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Staropoli, Mark **DIN:** 08-A-1665

Facility: Woodbourne CF **AC No.:** 09-171-18 B

Findings: (Page 7 of 7)

---

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).

Finally, there is no merit to Appellant's allegation that the Board denied Appellant parole for asserting his Constitutional right to a trial. The Board may inquire into the circumstances of the offense, subsequent developments, and the inmate's state of mind consistent with the Executive Law. See, e.g., Matter of Hamilton, 119 A.D.3d at 1274, 990 N.Y.S.2d at 720. That the Board explored his motivation to deny any misconduct and cast the young victim as a liar following arrest – including statements he himself made at sentencing – was not improper. There also is no indication in the record that the Board's decision was influenced by his decision to go to trial. Indeed, the Board recognized his right and explained it simply was trying to understand his mindset then, during incarceration and now. The Board did not resentence him.

In conclusion, 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, 95 N.Y.2d at 476, 718 N.Y.S.2d 704 (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.