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December 2020

### Administrative Appeal Decision - Brim, Marvin (2019-02-27)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Brim, Marvin

Facility: Collins CF

NYSID: [REDACTED]

Appeal Control No.: 09-051-18 B

DIN: 13-A-5537

Appearances: Janet Sabel, Esq.  
The Legal Aid Society  
199 Water Street, 5th Floor  
New York, New York 10038

Decision appealed: August 2018 decision, denying discretionary release and imposing a hold of 18-months.


Board Member(s) who participated: Smith, Drake.

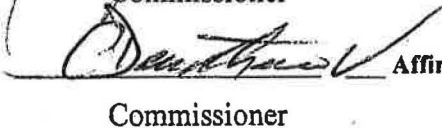
Papers considered: Appellant's Brief received January 15, 2019


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:

 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 66.

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

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Appellant challenges the August 2018 determination of the Board, denying release and imposing a 18--month hold.

Appellant raises the following issues in his brief: (1) the Board’s decision was made in violation of applicable legal authority; (2) the Board did not provide sufficient weight to Appellant’s programming, letters of support, Certain COMPAs scores, and other achievements; (3) the Board committed error with respect to Appellant’s criminal history; (4) the Board did not have Appellant’s sentencing minutes.

As to the first and second issues, 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). “Although these standards are no longer repeated in the [Board’s] regulation, this in no way modifies the statutory mandate requiring their application.” Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

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. 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; 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 Phillips v. Dennison, 41 A.D.3d 17. 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,

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914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); 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); People ex rel. Herbert, 97 A.D.2d 128.

In 2011, the 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); 9 N.Y.C.R.R. §8002.2(a). 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 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). Notably, 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. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. See Executive Law § 259-i(2)(c)(A). Thus, the COMPAS instrument cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three 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). Furthermore, declining to afford the COMPAS controlling weight does not violate the 2011 amendments. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016).

As to the third issue, the Board reviewed Appellant’s criminal history with him during the interview. The Board listened to his remarks concerning his extensive criminal history, and no errors were made in the Board’s decision relating to this issue. If Appellant disagrees with the information contained in his rap sheet or presentence investigation report, he must undertake efforts to request proposed changes. The Board must rely upon the accuracy of the information contained in these records. See Executive Law § 259-i(2)(c)(A).

As to the fourth issue, where the Board had made good faith efforts to obtain the sentencing minutes from the sentencing court, but was unsuccessful, and Appellant failed to produce documentation that the sentencing minutes contained a recommendation as to the suitability of his possible release to parole supervision, the Board’s failure to consider the sentencing minutes did not prejudice Appellant and amounted to harmless error. Matter of Matul v. Chair of the New York

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State Board of Parole, 69 A.D.3d 1196, 894 N.Y.S.2d 200 (3d Dept. 2010); Matter of Midgette v. New York State Division of Parole, 70 A.D. 3d 1039, 895 N.Y.S.2d 530 (2d Dept. 2010). Furthermore, when the sentencing minutes are unavailable at the time of the interview, Appellant is not entitled to a presumption that the sentencing minutes contained a favorable parole recommendation. Matter of Geraci v. Evans, 76 A.D.3d 1161, 907 N.Y.S.2d 726 (3d Dept. 2010); Matter of Midgette, 70 A.D.3d 1039; Matter of Lebron v. Alexander, 68 A.D.3d 1476, 892 N.Y.S.2d 579 (3d Dept. 2009).

**Recommendation:** Affirm.