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### Administrative Appeal Decision - Francesco, Michael (2019-05-23)

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STATE OF NEW YORK – BOARD OF PAROLE

**ADMINISTRATIVE APPEAL DECISION NOTICE**

**Name:** Francesco, Michael

**Facility:** Bare Hill CF

**NYSID:** [REDACTED]

**Appeal Control No.:** 10-195-18 B

**DIN:** 18-R-0093

Appearances: Daniel Belano Esq.  
150 Corporate Plaza  
Islandia, New York 11749

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


Board Member(s) who participated: Smith, Crangle, Coppola


Papers considered: Appellant's Brief received February 22, 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 5/23/19 66.

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**APPEALS UNIT FINDINGS & RECOMMENDATION**

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Appellant challenges the October 2018 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense involves viewing child pornography. Appellant raises the following claims: 1) the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors, as they ignored his positive institutional record and release plans. 2) the Board ignored the EEC. 3) the decision illegally resentenced him. 4) the decision lacks detail. 5) the departure from the COMPAS is void, as it fails to comply with the applicable regulation. 6) the 24 month hold is excessive.

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). 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). 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).

Although the Board placed particular emphasis on the nature of the crime, the Board considered other factors and was not required to give equal weight to or discuss each factor considered. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016).

The fact that the appellant had a prior violation of probation is also a basis for denying parole release. Velasquez v Travis, 278 A.D.2d 651, 717 N.Y.S.2d 702 (3d Dept 2000); Vasquez v New York State Division of Parole, 215 A.D.2d 856, 626 N.Y.S.2d 332 (3d Dept 1995); People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1<sup>st</sup> Dept 1983).

The Board may consider vulnerability of the victims. Matter of Yourdon v. New York State Div. of Parole, 32 A.D.3d 1065, 1066, 820 N.Y.S.2d 366, 367 (3d Dept. 2006), lv. denied, 8 N.Y.3d 801, 828 N.Y.S.2d 292 (2007).

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T]here is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

The Board may consider an inmate’s need to complete rehabilitative programming in denying parole. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997); see also Matter of Connelly v. New York State Div. of Parole, 286 A.D.2d 792, 729 N.Y.S.2d 808, 809 (3d Dept.), appeal dismissed 97 N.Y.2d 677, 738 N.Y.S.2d 291 (2001).

Receipt of an EEC does not preclude denial of parole. Matter of Milling v. Berbary, 31 A.D.3d 1202, 1203, 819 N.Y.S.2d 373, 374 (4th Dept.), lv. denied, 7 N.Y.3d 808, 809, 822 N.Y.S.2d 481 (2006); Matter of Romer v. Dennison, 24 A.D.3d 866, 867, 804 N.Y.S.2d 872, 873 (3d Dept. 2005); Matter of Barad v. New York State Bd. of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), lv. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001).

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). Moreover, the Board is not required to give each factor equal weight. Matter of Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818; Matter of Pearl, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817. 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 (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). Appellant’s receipt of an EEC did not preclude the Board from considering and placing greater emphasis on his criminal behavior and record on community supervision. 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 310 (3d Dept. 2008).

The Board’s decision satisfied the criteria set out in Executive Law § 259-i(2)(a), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v.

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Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); 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).

Appellant's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board 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). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The appellant has not in any manner been resentenced. 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).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013). Denial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute. Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008).

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 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, 468 N.Y.S.2d 881.

The Board's departure from the COMPAS did comply with the applicable regulation, as the instant offense, and violation of probation, do show there is a reasonable probability appellant would not live and remain at liberty without violating the law. Not to mention, lack of insight and remorse, and need for further programming as well, justify the departure.

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

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

**Recommendation:** Affirm.