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December 2020

### Administrative Appeal Decision - Harris, Michael (2019-02-27)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Harris, Michael

Facility: Gowanda CF

NYSID: [REDACTED]

Appeal Control No.: 08-027-18 B

DIN: 93-A-9536

Appearances: Stephen Underwood, Esq.  
1395 Union Road  
West Seneca, New York 14224

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

Board Member(s) who participated: Coppola, Demosthenes, Drake

Papers considered: Appellant's Brief received December 7, 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 66

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Appellant was sentenced to 17 and a half years to life upon his conviction of Murder in the second degree. In the instant appeal, Appellant challenges the July 2018 determination of the Board denying release and imposing a 18-month hold on the following grounds: (1) the decision was made in violation of lawful procedure because the Board failed to consider all statutory factors such as mitigating factors; (2) the decision was arbitrary and capricious because the Board denied parole based on the severity of instant offense without any aggravating circumstances or evaluating the likelihood that he presents a current danger to society based on his institutional record; (3) the decision constitutes an unauthorized resentencing and denies Appellant his legitimate expectation of release; (4) the decision is arbitrary and capricious because Appellant was denied parole for the same reasons set forth in prior appearances, namely, the severity of the instant offense; (5) the Board improperly failed to release him despite the fact that the COMPAS instrument was “low risk” overall; (6) DOCCS failed to develop a Transitional Accountability Plan (TAP); (7) the decision was made in violation of lawful procedure when the Board failed to state in detail the reasons for the denial of parole; and (8) Appellant was denied due process because the panel failed to provide a record of its deliberations. 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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007). 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

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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).

Here, the record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant murder offense wherein Appellant stabbed an 80 year old friend of his mother's at least ten times and caused her death; Appellant's lengthy criminal history and record on community supervision; his history of substance abuse; his institutional record including completion of ART and ██████████ educational efforts, and discipline reflecting four new infractions since his last appearance; and ██████████ and work with a reentry program. The Board also had before it and considered, among other things, the sentencing minutes, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet. There is no support for Appellant's claim that the Board was required to treat as mitigating circumstances that he was under the influence of drugs when he committed the instant offense, was addicted to crack cocaine, and does not know why he murdered his victim.

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 lengthy history of criminal conduct in the community and the serious, brutal instant offense that represents a continuation and serious escalation of larcenous and violent behaviors. See Matter of Partee v. Evans, 117 A.D.3d 1258, 1259, 984 N.Y.S.2d 894 (3d Dept.), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014); Matter of Singh v. Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept.), lv. denied, 24 N.Y.3d 906, 995 N.Y.S.2d 715 (2014); Matter of Thurman v. Hodges, 292 A.D.2d 872, 873, 739 N.Y.S.2d 324 (4th Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002). In addition, the Board expressed concern about Appellant's continued struggles with facility rules so far into his sentence. See Matter of Byas v. Fischer, 120 A.D.3d 1586, 1586-87, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Smith v. New York State Div. of Parole, 81 A.D.3d 1026, 916 N.Y.S.2d 285 (3d Dept. 2011). Thus, while the Board may emphasize the severity of the inmate's offense over other factors considered, see 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 Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016), the determination here was based on additional considerations, including Appellant's institutional record.

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

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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). Moreover, an inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme “holds out no more than a possibility of parole.” Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001).

Appellant objects to the fact that the Board decision is based on the same reasons given after his last appearance before the Board. Even assuming that were true, as the Board is required to consider the same statutory factors each time an inmate appears, it follows that the Board may deny release on the same grounds as relied upon in previous determinations. Matter of Hakim v. Travis, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3d Dept. 2003); see also Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008).

Appellant’s additional contention that the Board failed to comply with the 2011 amendments to the Executive Law is likewise without merit. The 2011 amendments require procedures incorporating risk and needs principles to “assist” the Board in making parole release decisions. Executive Law § 259–c(4). 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). 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. 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. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board

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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). In so doing, the Board may consider negative aspects of the COMPAS instrument. See Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). That is exactly what occurred here.

As for the Transitional Accountability Plan (TAP), the name of the TAP was changed to “Offender Case Plan.” The existing regulations refer to and require consideration of the most current “case plan” that may have been developed by DOCCS pursuant to Correction Law § 71-a. 9 N.Y.C.R.R. § 8002.2(b). An Offender Case Plan was prepared for Appellant and considered by the Board.

The Board’s decision also satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), 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. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations: Appellant’s lengthy criminal history, the serious instant offense and the senseless loss of life he caused, and his disciplinary record reflecting continued struggles.

Finally, there is no due process requirement that the internal deliberations or discussions of the Board appear on the record. Matter of Barnes v. New York State Div. of Parole, 53 A.D.3d 1012, 862 N.Y.S.2d 639 (3d Dept. 2008); Matter of Borcsok v. New York State Div. of Parole, 34 A.D.3d 961, 823 N.Y.S.2d 310 (3d Dept. 2006); Matter of Collins v. Hammock, 96 A.D.2d 733, 465 N.Y.S.2d 84 (4th Dept. 1983).

In conclusion, the appellant has failed to demonstrate the Board’s decision was not made in accordance with the pertinent requirements or was so irrational as to border on impropriety. Parole release is a discretionary function of the Board, and the appellant has not demonstrated that any abuse in this regard by the Board has occurred.

**Recommendation:** Affirm.