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Administrative Appeal Decision - Kearney, Michael (2019-01-31)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Kearney, Michael Facility: Gouverneur CF
NYSID: [REDACTED] Appeal Control No.: 07-156-18 B
DIN: 16-B-0950

Appearances: Christina F. Myers, Esq.
411 Main Street, 2nd Floor
Catskill, New York 12414

Decision appealed: July 2018 decision, denying discretionary release and imposing a hold of 6-months.

Board Member(s) who participated: Cruse, Demosthenes, Shapiro

Papers considered: Appellant’s Brief received November 1, 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 hearing ___ Modified to ___

Commissioner

 Affirmed ___ Vacated, remanded for de novo hearing ___ Modified to ___

Commissioner

 Affirmed ___ Vacated, remanded for de novo hearing ___ 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 1/31/19 60

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Kearney, Michael

DIN: 16-B-0950

Facility: Gouverneur CF

AC No.: 07-156-18 B

Findings: (Page 1 of 2)

Appellant challenges the July 2018 determination of the Board, denying release and imposing a 6-month hold.

Appellant raises the following issues in his brief: (1) the Board’s decision was arbitrary and capricious and irrational, with too much emphasis placed on Appellant’s crime of conviction and poor disciplinary record, and insufficient weight being given to his institutional programming and release plans; (2) the hold of 6 months was excessive; and (3) Appellant, appearing before the Board as a parole violator, should have been released upon completion of the 24-month time assessment imposed by the Administrative Law Judge.

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 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, 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 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).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Findings: (Page 2 of 2)

As to the second issue, the Board has discretion to hold an inmate for a period of up to 24 months. 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 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Therefore, the hold of 6 months was not excessive or improper.

In response to the third issue, if a parole violator serving an indeterminate sentence commits a serious disciplinary infraction while incarcerated, the violator must be referred to the Board for consideration of re-release. Executive Law § 259-i(3)(f)(x); 9 N.Y.C.R.R. § 8002.6(c), (d). Appellant committed three Tier III infractions that occurred since his return to custody on the parole violation. [REDACTED]

Recommendation: Affirm.