Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Parole Administrative Appeal Decisions | Parole Administrative Appeal Documents

December 2020

Administrative Appeal Decision - Thames, Michael (2019-04-29)

Follow this and additional works at: https://ir.lawnet.fordham.edu/aad

Recommended Citation

"Administrative Appeal Decision - Thames, Michael (2019-04-29)" (2020). Parole Information Project https://ir.lawnet.fordham.edu/aad/323

This Parole Document is brought to you for free and open access by the Parole Administrative Appeal Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Parole Administrative Appeal Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Thames, Michael **Facility:** Woodbourne CF

NYSID: [redacted] **Appeal Control No.:** 09-115-18B

DIN: 84-B-2088

Appearances: Thomas Kaczkowski, Esq.
P.O. Box 203
Wurtsboro, New York 12790

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

Board Member(s) who participated: **Cruse, Berliner, Shapiro**

Papers considered: Appellant's Brief received January 8, 2019
Appellant's Supplemental Brief received January 8, 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 4/09/19 66.

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: Thames, Michael **DIN:** 84-B-2088

Facility: Woodbourne CF **AC No.:** 09-115-18 B

Appellant was sentenced to 25 years to life upon his conviction of Murder in the Second Degree (2 counts) and Robbery in the First Degree. In the instant appeal. Appellant challenges the August 2018 determination of the Board denying release and imposing a 18-month hold on the following grounds: (1) the Board failed to adequately consider all required factors, including the rehabilitative component of Executive Law § 259-i as required by the 2011 amendments; (2) the decision is arbitrary and capricious because the Board placed undue emphasis on the instant offense; (3) the decision thereby violated due process; (4) the Board improperly denied release despite low COMPAS scores and considered an unsupported score for reentry substance abuse; (5) the decision is conclusory and unsupported; (6) Appellant was denied a meaningful opportunity for release because the Board failed to consider his age in violation of both the ban on cruel and unusual punishment and due process; (7) the Board was biased against him because one Commissioner unjustifiably mentioned an old Tier III infraction despite improvement and it played a role in the decision; and (8) the Board issued a predetermined decision and denied release based on its personal opinion of the instant offense. 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016). 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 offense wherein Appellant stabbed and bludgeoned to death a 16 y.o. female friend in her apartment, in the presence of her 2 y.o. sister, while there to rob her; Appellant's account of the incident indicating he hit the victim a few times with barbells and fled after she stabbed him in the eye, head and back with his knife and blocked his exit; that this is Appellant's first State term; his institutional record including participation in AVP and NA/AA among other programs, educational efforts and discipline reflecting three new Tier II infractions which the Board acknowledged as improvement in light of prior Tier IIIs such as for assaults, violence, harassment and weapons; his mental health and substance abuse history; and release plans to seek enrollment in a program with Ready, Willing and Able and apply for disability assistance. In addition, the Board considered that Appellant was 17 years old at the time of the instant offense, the circumstances of his youth and his subsequent development. The Board also had before it and considered, among other things, the pre-sentence investigation report, the Parole Board Report, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet. That the Board did not comment on and analyze on the record every aspect of Appellant's institutional record and release plans does not constitute convincing evidence that the Board did not consider them.

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 the gravity of the instant offense and Appellant's lack of insight in view of his account of the offense. See Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; 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 Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002). And while recognizing the COMPAS instrument presented Appellant as low risk overall, the Board disagreed and cited the elevated reentry substance abuse score in view of the role drug use played in the serious instant offense. 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).

The Board's determination – after considering the full record – that the severity of the inmate's crime outweighed other factors was within its discretion. Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); see also 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 Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998); Matter of Carrion v. New York State Bd. of

---

Parole, 210 A.D.2d 403, 404, 620 N.Y.S.2d 420, 421 (2d Dept. 1994). 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). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. 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's suggestion 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 LeGeros, 139 A.D.3d 1068, 30 N.Y.S.3d 834; 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, including the instant offense. The amendments also did not change the 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 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). That is exactly what occurred here.

In addition to other required matters, the Board considered Appellant's COMPAS instrument which was not uniformly low. See Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017). This includes "probable" for the reentry substance abuse scale. Appellant's suggestion that his score is low based on the figure associated with the scale is misplaced. That figure simply indicates how he compared to a norm group composed of the offender population as a whole and is not an indication that his score is low in absolute terms. Contrary to Appellant's claim, his institutional record did not render the Board's concern about the elevated substance abuse score

irrational in view of the role drugs played in Appellant's brutal crime. See Matter of Bush, 148 A.D.3d 1392, 50 N.Y.S.3d 180.

The Board's decision 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, including the gravity of the offense and Appellant's lack of insight. The Board is not required to address each factor considered in its decision. 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). Appellant objects to the Board's assessment of his insight and the COMPAS instrument's substance abuse score. However, it was well within the Board's authority to make an assessment of Appellant's credibility (Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008)) and the Board's assessment of his insight is amply supported by the record. While broadly stating he used "poor judgment" and "bad decision making" resulting in his taking an innocent life (Tr. at 3), he failed to truly take responsibility for his brutal crime and demonstrated no meaningful insight. Furthermore, the Board does not determine COMPAS scores and an administrative appeal is not the proper forum to challenge the COMPAS instrument. And as indicated, the Board's concern with the reentry substance abuse score was not irrational.

The Board's obligation to consider an inmate's youth (under 18) in relation to the commission of the instant offense arises from the Third Department's decision in Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 39, 30 N.Y.S.3d 397, 400 (3d Dept. 2016), and the Board's amended regulations, 9 N.Y.C.R.R. § 8002.2(c). Consistent with that obligation, the decision explicitly acknowledges Appellant's youth at the time of the offense and the interview transcript demonstrates the Board considered his youth, attendant circumstances, and subsequent development as required. 9 N.Y.C.R.R. § 8002.2(c); Matter of Hawkins, 140 A.D.3d 34, 30 N.Y.S.3d at 400. Indeed, Appellant also complains that the Board gave *too much* attention to his age at the time of the offense. (Br. at 5.) The Board began the interview with an inquiry into the inmate's age at the time of the crime and confirmed he was 17. (Tr. at 3.) The panel discussed with him his youth and he was given the opportunity to speak at length about various matters, including schooling; that he devoted himself to being a promoter and producer helping other community youth; that he sought money from the victim so he could buy marijuana to protect his image; that his mother allowed elders to take him out and he began

---

carrying a weapon (a knife) to be like them because he felt responsible for his talent's well-bring like the elders were for him; that he lived with his mother and seven siblings and there was no father figure in the household; that he did odd jobs and summer youth program jobs; and that he used marijuana daily. (Tr. at 3-5, 11, 13-14, 18.) The panel also discussed with him that he is now 53 and his development, including his discipline, programming, and educational efforts. (Tr. at 13, 16-18, 19-20.) The Board considered the inmate's youth at the time of the offense, but ultimately placed greater emphasis on other factors, including the gravity of his crime and his lack of insight, "as it was entitled to do." Matter of Allen v. Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept.) (citing Matter of Hamilton, 119 A.D.3d at 1274, 990 N.Y.S.2d 714), lv. denied, 32 N.Y.3d 903 (2018)).

While Appellant argues the Board was biased by a Commissioner's improper mention of a Tier III ticket that played a role in the denial decision, the Board committed no error by considering Appellant's entire disciplinary record, including a Tier III ticket stemming from an assault on a female correction officer. We further note the Commissioner was observing that, while Appellant received three new Tier II tickets, he was showing improvement considering his prior disciplinary history included assaults on staff and inmates, violent conduct and weapons and "it's good to see that you sort of turned the corner…" (Tr. at 16.) Likewise, the Board's decision acknowledged his discipline improved since his last appearance. Thus, there is no record support to prove 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).

There also is no evidence the Board's decision was predetermined or based on the panel's personal opinion of the instant offense. See 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). That the Board ultimately denied parole following its consideration of the full record does not mean the decision was predetermined or based on the panel's personal opinion of the offense. See Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 240, 657 N.Y.S.2d 415, 418-19 (1st Dept. 1997). Appellant's suggestion that the Board retried him and 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). In so doing, the Board properly considered the instant offense and the pre-sentence investigation report reflecting that the victim, who was found naked

---

but for a bra, was stabbed and bludgeoned to death and committed no error by considering that Appellant was not forthcoming about his crime. See Matter of Silmon, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704; Matter of Crawford, 144 A.D.3d 1308, 46 N.Y.S.3d 228. The appellant has not in any manner been resentenced. Matter of Mullins, 136 A.D.3d at 1142, 25 N.Y.S.3d 698.

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, 50 N.Y.2d 69, 427 N.Y.S.2d 982).

Recommendation: Affirm.