December 2020

Administrative Appeal Decision - Montanez, Pedro (2019-04-29)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Montanez, Pedro **Facility:** Ulster CF

NYSID: [redacted] **Appeal Control No.:** 06-046-18 B

DIN: 15-A-0837

Appearances: Lyle T. Hajdu, Esq.
414 East Fairmount Avenue
P.O. Box 414
Lakewood, New York 14750

Decision appealed: May 2018 decision, denying discretionary release and imposing a hold to parole eligibility date.

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

Papers considered: Appellant's Brief received February 11, 2019

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, 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 4/29/19 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

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Findings: (Page 1 of 3)

Appellant challenges the May 2018 determination of the Board, denying release and imposing a hold to parole eligibility date.

Appellant is serving two concurrent terms of imprisonment of 3 to 6 years for the crimes of Grand Larceny 3rd, consecutive to a term of imprisonment of 2 to 4 years for the crime of Bail Jumping 2nd.

Appellant raises the following issues in his brief: (1) the Board's decision was arbitrary and capricious, made in violation of applicable legal authority, and relied too heavily upon the serious nature of Appellant's multiple felony convictions; (2) Appellant's receipt of an Earned Eligibility Certificate (EEC), programming, "good" disciplinary record, and family support were not given sufficient consideration by the Board; (3) the Board should have provided an interview with Appellant and a transcript of the interview; (4) failed to provide Appellant with guidance as to how to improve his chances of parole release; and (5) the Board's decision was conclusory and lacked sufficient detail.

As to the first two issues, 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, 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.

Appellant's receipt of an EEC does not automatically guarantee his release, and it does not eliminate consideration of the statutory factors including the instant offense. 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 White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006); 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). Where an inmate has been awarded 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). The standard set forth in Executive Law §259-i(2)(c)(A) requiring consideration of whether the inmate's release will so deprecate the seriousness of his crime as to undermine respect for the law does not apply in cases where an EEC has been awarded.

As to the third issue, Penal Law §70.40(1)(a)(v) provides that a person may be paroled after the successful completion of a shock incarceration program. Executive Law §259-i(2)(e) provides that the determination to parole an inmate who has successfully completed the shock incarceration program may be made without a personal interview of the inmate, and that if parole is not granted, the time period for reconsideration shall not exceed the court imposed minimum. 9 N.Y.C.R.R. §8010.2(b) provides that an eligible inmate participant in the shock incarceration program shall be considered for release onto parole prior to such inmate's completion of the program, except under certain circumstances otherwise specified in paragraph (g)(1) of such section. A decision to grant or deny release to parole will be made by at least two members of the Board, and will be premised on reports prepared and/or compiled by the Department of Corrections and Community Supervision (DOCCS) concerning the inmate participant. At the time of such review by members of the Board, the Board will assume that the inmate will successfully complete the program and be awarded a certificate of earned eligibility (EEC) by DOCCS. Upon the completion of its review, the Board will either: (1) issue a conditional grant of parole, conditioned on the inmate's successful completion of the shock incarceration program and the issuance of a certificate of earned eligibility to the inmate; or (2) deny release. If release is denied, the inmate shall be informed in writing, within two weeks of the Board's rendition of its decision, of the factors and reasons for such denial. The Appeals Unit notes that the Board made its decision to deny release in accordance with applicable statutory and regulatory requirements relating to inmates who have successfully completed the shock incarceration program

As to the fourth issue, the Board is not required to state what an inmate should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011); Matter of Freeman v. New York State Div. of

APPEALS UNIT FINDINGS & RECOMMENDATION

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Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

As to the fifth issue, 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); 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).

Recommendation: Affirm.