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December 2020

### Administrative Appeal Decision - Phifer, Renita (2018-12-28)

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Administrative Appeal Decision Notice

**Inmate Name:** PHIFER, RENITA

**Facility:** Taconic Correctional Facility

**NYSID No** [REDACTED]

**Appeal Control #:** 06-133-18 B

**Dept. DIN#:** 96G0030

Appearances:

For the Board, the Appeals Unit

For Appellant:

Renita Phifer (96G0030)  
Taconic Correctional Facility  
250 Harris Road  
Bedford Hills, New York 10507

Board Member(s) who participated in appealed from decision: Coppola, Demosthenes, Shapiro.

Decision appealed from: 6/2018 Denial of Discretionary Release; 24-month hold.

Pleadings considered:

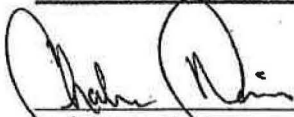
Brief on behalf of the Appellant submitted on: October 23, 2018.

Statement of the Appeals Unit's Findings and Recommendation.

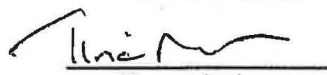
Documents relied upon:

Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

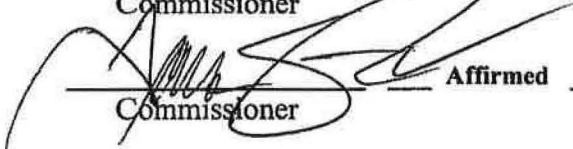
**Final Determination:** The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

  
Commissioner

Affirmed  Reversed for De Novo Interview  Modified to \_\_\_\_\_

  
Commissioner

Affirmed  Reversed for De Novo Interview  Modified to \_\_\_\_\_

  
Commissioner

Affirmed  Reversed 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 12/28/18.  
LB

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File  
P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

**STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION**

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Appellant raises various issues in the brief submitted in support of the administrative appeal initiated following the Board of Parole's decision to deny her immediate release to community supervision following an interview held on or about June 5, 2018. The Appeals Unit has reviewed each of the issues raised by Appellant and finds that the issues have no merit.

The issues raised by Appellant are as follows: (1) the Board's decision was not made in accordance with applicable legal authority; (2) the Board did not sufficiently consider Appellant's institutional accomplishments, remorse and rehabilitative efforts; (3) certain issues were not discussed during the interview; (4) the Board's decision was made in violation of Appellant's due process rights; (5) the Board failed to consider Appellant's sentencing minutes at the time of the interview; and (6) the Board did not provide sufficient weight to certain "low" scores contained in her COMPAS instrument.

As to issues one and two, the legal standard governing the decision-making process of the Board when assessing the suitability of an inmate's possible release to community supervision is: (1) whether or not there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law; (2) whether or not the inmate's release is incompatible with the welfare of society; and (3) whether or not the inmate's release will so deprecate the seriousness of the crime as to undermine respect for law. See Executive Law §§259-c(4), 259-i(2)(c)(A); Robles v. Dennison, 745 F. Supp. 2d 244 (W.D.N.Y. 2010); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). In the instant case, the Board considered each of these three factors and specifically relied upon factors (2) and (3) in making its determination to deny Appellant's release to community supervision and further found that it was not convinced that Appellant would live and remain at liberty without violating the law.

"Clearly, the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a [inmate] who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, **bears a heavy burden**." Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dep't 1997) (emphasis added). See also Matter of Phillips v. Dennison, 41 A.D.3d 17 (1<sup>st</sup> Dept. 2007).

Unless Appellant is able to demonstrate convincing evidence to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders on impropriety. Matter of Jackson v. Evans, 118 A.D.3d 701 (2d Dept. 2014); Matter of Williams v. New York State Div. of Parole, 114 A.D.3d 992 (3rd Dept. 2014); Matter of Thomches v. Evans, 108 A.D.3d 724 (2d Dept. 2013).

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In determining whether to grant parole to an inmate, the Board is required to consider a number of statutory factors (see Executive Law §§259-c(4); 259-i(2)(c)(A); 9 NYCRR §8002.2). In addition, the Board's decision must detail the reasons for a denial of discretionary release (see Executive Law §259-i(2)(a)(i)). However, the Board is not required to give each factor it considered equal weight (Matter of Arena v. New York State Dept. of Corr. & Community Supervision, 156 A.D.3d 1101 (3d Dept. 2017); Matter of Hill v. New York State Bd. of Parole, 130 A.D.3d 1130 (3d Dept. 2015); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Vigliotti v. State of N.Y. Exec. Div. of Parole, 98 A.D.3d 789 (3d Dept. 2012); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948 (2d Dept. 2012); Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690 (2d Dept. 2010)), and its actual or perceived emphasis on a specific factor is not improper as long as the Board complied with statutory requirements. Romer v. Dennison, 24 A.D.3d 866 (3d Dept. 2005); Matter of Collado v. New York State Division of Parole, 287 A.D.2d 921 (3d Dept. 2001); Matter of Rivera v. Executive Department, Board of Parole, 268 A.D.2d 928 (3d Dept. 2000).

The Board is entitled to afford more weight to the nature and seriousness of the underlying crime(s) and the inmate's criminal history than other factors. See Matter of Perez v. Evans, 76 A.D.3d 1130 (3d Dept. 2010). In this regard, the denial of release to community supervision primarily because of the gravity of the inmate's crime is appropriate. Karlin v. Alexander, 57 A.D.3d 1156 (3d Dept. 2008); Matter of Alamo v. New York State Div. of Parole, 52 A.D.3d 1163 (3d Dept. 2008); Matter of Flood v. Travis, 17 A.D.3d 757 (3d Dept. 2005).

The Court of Appeals unanimously affirmed the First Department decision in Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1<sup>st</sup> Dept. 2008), aff'd, 11 N.Y.3d 777 (2008), in which the Appellate Court held: (1) it is not improper for the Board to primarily base its decision to deny parole release on the seriousness of the offense(s); (2) the weight to be assigned to each factor considered by the Board in making its determination is to be made solely by the Board; (3) parole release should not be granted merely as a reward for good conduct or efficient performance of duties while confined; and (4) the Board can consider the credibility of statements made by the inmate in regard to whether full responsibility was taken for the criminal behavior.

So long as the decision denying release to community supervision is made in accordance with statutory requirements, it is not to be set aside when subject to administrative or judicial review, particularly given the narrow scope of judicial review of discretionary parole denial determinations. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013).

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An inmate is not automatically entitled to release to community supervision merely because of achievements within a prison's institutional setting, no matter how numerous. Pearl v. New York State Div. of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Corley v. New York State Div. of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Rivera v. Travis, 289 A.D.2d 829 (3d Dept. 2001). In addition, per Executive Law §259-i(2)(c)(A), an application for release to community supervision shall not be granted merely as a reward for Appellant's good conduct or achievements while incarcerated. Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001). Therefore, a determination that the inmate's exemplary achievements are outweighed by the severity of the crimes is within the Board's discretion. Matter of Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1<sup>st</sup> Dept. 2005); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004).

Appellant has the burden of showing that the Board's determination was irrational, bordering on impropriety, and therefore arbitrary and capricious, before administrative or judicial intervention is warranted. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Singh v. Dennison, 107 A.D. 3d 1274 (3d Dept. 2013). It is not the function of the Appeals Unit to assess whether the Board gave proper weight to the relevant factors, but only whether the Board followed applicable legal authority when rendering its decision, and that is supported, and not contradicted, by the facts in the record. Matter of Comfort v. New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009); see Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268. The weight to be accorded each of the requisite factors remains solely a matter of the Parole Board's discretion. See Matter of Dolan v. New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Matter of Singh v. Evans, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Montane v. Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903, appeal dismissed, 24 N.Y.3d 1052 (2014). Appellant has not demonstrated any abuse on the part of the Board in its decision-making process that would warrant a *de novo* release interview.

As to the third issue, Appellant was provided the opportunity to discuss with the Board during the interview any issues of interest, and cannot now be heard to complain that certain issues were not discussed, or the extent to which certain issues were discussed. See Matter of Serna v. New York State Division of Parole, 279 A.D.2d 684 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235 (1<sup>st</sup> Dept. 1997).

As to the fourth issue, Appellant claims that a constitutionally protected due process right was violated by the Board in making its determination. Initially, we note that the Supreme Court has held that because a person's liberty interest is extinguished upon conviction, there is no inherent right, or right under the U.S. Constitution, to parole. Greenholtz v. Inmates of the Nebraska Penal and

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Correctional Complex, 442 U.S. 1 (1979); Hewitt v. Helms, 459 U.S. 460 (1983). Likewise, there is no due process right to parole under the New York State Constitution. Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979); Matter of Russo, 50 N.Y.2d 69; Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005). Thus, the protections of the due process clause do not apply to the Parole Board's determinations as to whether an inmate should be released to parole supervision. Maldonado v. Evans, 2014 U.S. Dist. LEXIS 183163 (W.D.N.Y. 2014); Barrow v. Vanburen, 2014 U.S. Dist. LEXIS 181466 (N.D.N.Y. 2014); Barna v. Travis, 239 F.3d 169 (2d Cir. 2001). We recognize, however, that while an inmate has no vested right to parole release under the due process clause, there is a liberty interest which requires, as a matter of *procedural* due process, an opportunity to be heard, and a statement of the reasons for the denial of release. Therefore, in deciding whether to grant or deny parole, all the Board must do is: (1) afford the inmate an opportunity to be heard, and (2) if parole is denied, provide the reasons for the denial. Thurman v. Allard, 2004 U.S. Dist. LEXIS 18904 (S.D.N.Y. 2004); Blackett v. Thomas, 293 F.Supp.2d 317 (S.D.N.Y. 2003); Gittens v. Thomas, 2003 U.S. Dist. LEXIS 9087 (S.D.N.Y. 2003). Appellant received both of these constitutional protections and, therefore, any arguments alleging that the Board's decision was made in violation of the due process clause, and in contravention of a liberty interest arising from the due process clause, are without merit.

As to the fifth issue, with respect to Appellant's argument that the appealed from decision should be set aside because the Parole Board did not have the sentencing minutes from her sentencing proceeding at the time it interviewed her to assess the appropriateness of her discretionary release, there is no dispute that the Board neither had nor considered the sentencing minutes at the time the interview was conducted. However, where the Board had made good faith efforts to obtain the sentencing minutes from the sentencing court, but was unsuccessful, and Appellant failed to produce documentation that the sentencing minutes contained a parole recommendation, the Board's failure to consider the sentencing minutes did not prejudice Appellant and amounted to harmless error. Matter of Matul v. Chair of the New York State Board of Parole, 69 A.D.3d 1196 (3d Dept. 2010); Matter of Midgette v. New York State Division of Parole, 70 A.D. 3d 1039, (2d Dept. 2010); Glover v. The New York State Division of Parole, Index No. 2009-10824 (Sup. Ct., Orange Co., Jan. 19, 2010) (Bartlett, J.); Jose Andreo v. George Alexander, Index No. 185-09 (Sup. Ct., Albany Co., June 23, 2009)(Platkin, J.).

As to the sixth issue, in determining an inmate's suitability for possible release to community supervision, the Board must consider the institutional record of the inmate. See §259-i(2)(c)(A)(i); 9 N.Y.C.R.R. §8002.2(d)(1). One of the institutional records the Board must consider in making its determination as to the suitability of an inmate's possible release to community supervision is a risk and needs assessment designed to measure the inmate's rehabilitation. See Executive Law §259-c(4). In strict compliance with statutory and regulatory

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requirements, the Department of Corrections and Community Supervision promulgated Directive 8500 which provides comprehensive operating procedures governing the Correctional Offender Management Profiling for Alternative Sanctions instrument, commonly referred to as the COMPAS instrument, a research based clinical assessment instrument used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other interventions. "By adopting the COMPAS risk assessment and utilizing it in considering an inmate's release, the Board has effectively complied with the minimal requirements of the amendments to the Executive Law." Matter of Steven Diaz v. New York State Bd. of Parole, 42 Misc. 3d 532 (Sup. Ct.; Cayuga Co. 2013).

The information contained in the COMPAS instrument is used to assist the Board of Parole in making its decision, but the quantified results contained in the COMPAS instrument are not alone determinative factors in the decision-making process. See Executive Law §§259-c(4), 259-i(2)(c)(A); Matter of Leung v. Evans, 120 A.D.3d (3d Dept. 2014), lv. denied 24 N.Y.3d 914 (2015); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107 (3d Dept. 2014); accord, Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014). Moreover, uniformly low COMPAS scores and other evidence of an inmate's rehabilitation do not undermine the broader questions of public safety, public perceptions of the seriousness of a crime, and whether an inmate's release to parole would undermine respect for the law. Thus, the COMPAS instrument cannot mandate a particular result, and the Board determines the weight to be ascribed to the information contained therein. Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016).

The COMPAS instrument is used to develop the inmate's Offender Case Plan (formerly called the "Transitional Accountability Plan" or "TAP"), which is created for, and in cooperation with, an inmate by an Offender Rehabilitation Coordinator (ORC). The Case Plan serves to prioritize the inmate's needs and establish goals to address these needs, and further provides tasks designed to achieve these goals. Case Plans are reviewed with the inmate quarterly unless the inmate is more than four years from the earliest release date in which instance it is reviewed less frequently. A Case Plan was prepared for Appellant and made available to the Board at the time of the interview.

Appellant limits her remarks with respect to the COMPAS instrument to certain "Low" scores contained therein. However, she did score "High" for History of Violence. Also, there are several more pages of narrative and scales contained in the COMPAS instrument that the Board also reviewed and considered in making its decision to deny parole release. The Board in deviating from the low COMPAS scores looked at all of these factors as well as all of the other records before it at the time of the interview, and of course considered what was discussed during the interview.

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Finally, we note that there is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. See People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914 (3d Dept. 1992). The Board is presumed to have followed applicable statutory requirements and internal policies when making decisions regarding the suitability of an inmate's possible release to parole supervision. See Garner v. Jones, 529 U.S. 244 (2000). There is no evidence that the Board's decision was predetermined. See Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

**Recommendation:**

It is the recommendation of the Appeals Unit that the Board's decision be affirmed.