December 2020

Administrative Appeal Decision - Smallwood, Stacey (2019-05-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Smallwood, Stacey **Facility:** Clinton CF

NYSID: [redacted] **Appeal Control No.:** 10-174-18B

DIN: 93-A-7461

Appearances: Tina Soloski, Esq.
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Decision appealed: September 2018 decision denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Alexander, Crangle**

Papers considered: Appellant's Brief received February 21, 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:

_____ ___ **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 5/10/19 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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Appellant was sentenced to 25 years to life upon his conviction of Murder in the second degree. In the instant appeal, Appellant challenges the September 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the Board's decision was arbitrary and capricious because the Board placed too much emphasis on the instant offense without properly considering other factors such as his release plans and institutional record; and (2) Appellant was denied the opportunity to present evidence regarding his programming. 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 King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d 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 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, 468 N.Y.S.2d 881.

Parole Board release decisions made in accordance with the law will not be disturbed unless irrational "bordering on impropriety." Matter of Silmon, 95 N.Y.2d at 476, 718 N.Y.S.2d 704 (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)). There are no substantial evidence issues, as Appellant appears to suggest. Matter of Tatta v. Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept.), lv. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005).

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein subject and a co-defendant shot and killed a victim after an argument; Appellant's criminal history and record on community supervision; his mental health; his institutional record including discipline reflecting over 100 infractions for such matters as violent conduct, weapon, stalking, lewd conduct and drug possession, program efforts, multiple program removals due to continued infractions and refusal of SOP; and release plans to reside with his wife, work and pursue computer school and a CDL. The Board also had before it and considered, among other things, the sentencing minutes, a record of program assignments and disciplinary history, Appellant's case plan, and the COMPAS instrument.

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 instant murder offense for which Appellant continues to maintain his innocence and that is a continuation of his limited criminal history, Appellant's limited rehabilitation efforts due to discipline that has impeded programming, and elevated COMPAS scores for felony violence and reentry substance abuse. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. The Board encouraged Appellant to use his time to demonstrate his ability to follow rules by remaining discipline free so he could restart and complete recommended programs.

Appellant objects that he was denied the opportunity to present evidence regarding his programming during the "hearing." Appellant's challenge appears to be based in part upon the mistaken impression that an appearance before the Board is a formal hearing in which documentary and testimonial evidence is introduced. However, a parole interview is not an adversarial proceeding; rather, the Board conducts an informal interview which is intended to function as a non-adversarial discussion between the inmate and panel as part of an administrative inquiry into the inmate's suitability for release. Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28, 298 N.Y.S.2d 704, 710 (1969); Matter of Banks v. Stanford, 159 A.D.3d 134, 144, 71 N.Y.S.3d 515, 522 (2d Dept. 2018). Nonetheless, an inmate may submit a parole packet in advance of the interview for the Board's consideration as part of this process. Appellant made no such submission and did not request a postponement of the interview. While he indicated during the interview that he attempted to take as many programs as he could such as [redacted] and AVP and had papers with him if the Board wanted to see them, the Board accepted his representation. At the same time, Appellant acknowledged he was removed from some programs such as ART and vocational

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training and the Board was reasonably concerned by multiple removals from recommended programs. Thus, the Board's determination was not affected by an error of law or fact.

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.

Recommendation: Affirm.