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Administrative Appeal Decision - Dickson, Tanika (2019-02-27)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Dickson, Tanika

Facility: Albion CF

NYSID: [REDACTED]

Appeal Control No.: 09-154-18 B

DIN: 00-G-1158

Appearances: Tanika Dickson 00G1158
Albion Correctional Facility
3595 State School Road
Albion, New York 14411

Decision appealed: September 2018 decision, denying discretionary release and imposing a hold of 12-months.


Board Member(s) who participated: Agostini, Berliner

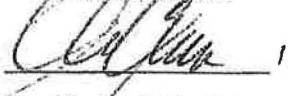
Papers considered: Appellant's Brief received November 5, 2018

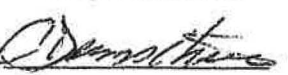
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 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 2/27/19.

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Appellant challenges the September 2018 determination of the Board, denying release and imposing a 12-month hold. Appellant's brief raises the following issues: 1) the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors, as appellant has an excellent institutional record and release plan. 2) the Board decision lacks substantial evidence. 3) the Board illegally resentenced her. 4) no aggravating factors exist. 5) the Board failed to make required findings of fact. 6) the Board was biased. 7) the Board did not allow appellant access to her entire file. 8) the Board failed to comply with the 2011 amendments to the Executive Law and the 2017 regulation in that they are now rehabilitation and forward based, the COMPAS had an error on it, and no valid reason for deviating from the COMPAS was given.

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). The Board "considered all of the relevant factors and was free to place emphasis on brutal nature of the crime..." 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).

Even when an inmate's institutional record is exemplary, the Board may place particular emphasis on the violent nature of or gravity of the crime, so long as the relevant statutory factors are considered. The record establishes the Board acknowledged inmate's extensive rehabilitative success along with additional statutory factors, but placed greater emphasis on the seriousness of his crimes in determining release would be incompatible with the welfare of society and so

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deprecate the seriousness of the offenses as to undermine respect for the law, as it is entitled to do. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1272, 1273-74, 990 N.Y.S.2d 714, 718, 719 (3d Dept. 2014). The decision to deny parole may be based upon the seriousness of the crime and its violent nature.” Matter of Putland v. Herbert, 231 A.D.2d 893, 648 N.Y.S.2d 401 (4th 1996), lv. denied, 89 N.Y.2d 806, 654 N.Y.S.2d 716 (1997).

There are no substantial evidence issues in a Parole Board Release Interview. Valderrama v Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005); Tatta v Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept. 2006) lv.den. 6 N.Y.3d 714, 816 N.Y.S.2d 750; Harris v New York State Division of Parole, 211 A.D.2d 205, 628 N.Y.S.2d 416 (3d Dept. 1995). A substantial evidence issue arises only where a quasi-judicial hearing has been held and evidence has been taken pursuant to law. If no hearing was held, the issue does not arise. Horace v Annucci, 133 A.D.3d 1263, 20 N.Y.S.3d 492 (4th Dept. 2015). A proceeding to determine whether an inmate should be released on parole is not a quasi-judicial hearing. Banks v Stanford, 159 A.D.3d 134, 71 N.Y.S.3d 515 (2d Dept. 2018).

Appellant’s assertion that 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). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The appellant has not in any manner been resentenced. 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).

Insofar as Appellant argues aggravating factors are required, the inmate’s reliance on Matter of King v. New York State Div. of Parole, 190 A.D.2d 423, 598 N.Y.S.2d 245 (1st Dept. 1993), aff’d in part on other grounds 83 N.Y.2d 788, 610 N.Y.S.2d 954 (1994), is misplaced. The Third Department recognizes the Board may place greater weight on the nature of the crime without the existence of any aggravating factors. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014).

The Board provided its statutory rationale for denying parole. Compare Matter of Vaello v. Parole Bd. Div. of State of New York, 48 A.D.3d 1018, 1019, 851 N.Y.S.2d 745, 746–47 (3d Dept. 2008) (annulling determination that did not identify any of the standards set forth in the statute but merely noted crimes and stated inmate was poor candidate for release), with Matter of Murray v.

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Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013).

Appellant made no request on appeal for the entire contents of her parole file, thereby waiving the issue. Matter of Shaffer v. Leonardo, 179 A.D.2d 980, 579 N.Y.S.2d 910 (3d Dept. 1992); Boddie v New York State Division of Parole, 288 F.Supp.2d 431 (S.D.N.Y. 2003). Failure to make a timely request for access to material needed for the Parole Board Release Interview will result in a dismissal of any claim alleging denial of access to said material. Cruz v Travis, 273 A.D.2d 648, 711 N.Y.S.2d 360 (3d Dept 2000). In any event, an inmate has no constitutional right to the information in her parole file, Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976), and generally is not entitled to confidential material, Matter of Justice v. Comm’r of New York State Dep’t of Corr. & Cmty. Supervision, 130 A.D.3d 1342, 15 N.Y.S.3d 853 (3d Dept. 2015); Matter of Perez v. New York State Div. of Parole, 294 A.D.2d 726, 741 N.Y.S.2d 753 (3d Dept. 2002); Matter of Macklin v. Travis, 274 A.D.2d 821, 711 N.Y.S.2d 915, 916 (3d Dept. 2000). The Board may consider confidential information. Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014).The Board may designate certain parole records as confidential. See Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (citing Public Officers Law § 87(2)(a), (f); Executive Law § 259-k(2); 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a), (b)).

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, 468 N.Y.S.2d 881.

There is a presumption of honesty and integrity that attaches to Judges and administrative factfinders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371

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(2000). There must be support in the record to prove an alleged bias and proof 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) (rejecting bias claim); Matter of Grune v. Board of Parole, 41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007) (same). No such evidence exists in this matter.

The 2011 amendments still permit the Board to place greater emphasis on the gravity of the crime. Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) *appeal dismissed* 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016). The Board can still consider the nature of the inmate’s crimes, the criminal history, the prison disciplinary record, the program accomplishments and post release plans. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014). The Board is obligated to consider the serious nature of the crime. Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014).

As for the alleged COMPAS error, as appellant failed to raise an objection to the complained of fact at the parole interview, this claim has not been preserved. Matter of Morrison v. Evans, 81 A.D.3d 1073, 916 N.Y.S.2d 655 (3d Dept. 2011); Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000). In view of the inmate’s failure to raise purported errors in the COMPAS instrument when given the opportunity to discuss the matter at the interview, and in the absence of any evidence the Board’s determination was meaningfully affected by an alleged error of fact, the Board’s decision will not be disturbed. Matter of Paniagua v. Stanford, Index # 0913-16, *Decision & Order* dated Oct. 20, 2016 (Sup. Ct. Sullivan Co.)(Schick J.S.C.), *aff’d*, 153 A.D.3d 1018, 56 N.Y.S.3d 894 (3d Dept. 2017); Matter of Mercer v. New York State Dep’t of Corr. & Cmty. Supervision, Index # 5872-13, *Decision/Order/Judgment* dated April 7, 2014 (Sup. Ct. Albany Co.)(Ceresia J.S.C.).

In denying parole, the Board did not depart from the COMPAS scores because it concluded, *despite* low risk scores, that the appellant had the “ability to kill for so little reason.” And, because appellant was “overreacting in an extreme way.”

Recommendation: Affirm.