December 2020

Administrative Appeal Decision - Eid, Tareq (2019-05-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Eid, Tareq **Facility:** Cape Vincent CF

NYSID: [redacted] **Appeal Control No.:** 10-115-18 B

DIN: 18-B-0727

Appearances: Scott Otis, Esq.
PO Box 344
Watertown, New York 13601

Decision appealed: October 2018 decision denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Davis, Berliner**

Papers considered: Appellant's Brief received March 6, 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 5/10/19 AL.

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 one to three years upon his conviction of Grand Larceny – Not Auto in the third degree. In the instant appeal, Appellant challenges the October 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the decision is arbitrary and capricious because the Board failed to meaningfully consider all factors such as his institutional record and release plans as well as his COMPAS instrument; (2) the decision is arbitrary and capricious because the Board relied on his criminal behavior; and (3) the Board considered erroneous information and made improper comments demonstrating the decision may have been the product of unfair bias. 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 Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); 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, while employed at a gas station, stole approximately $76,800 from a dealership by using its gas cards to pay for cash sales

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by other customers and keeping the cash over an extended period; Appellant's criminal history; his institutional record including voluntary sign-out from SHOCK, vocational programming and positive disciplinary; and release plans to reside with his fiancé, work and attend [redacted]. The Board also had before it and considered, among other things, the pre-sentence investigation report, the sentencing minutes, 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 offense, Appellant's limited insight and his need to complete a number of programs after his refusal to complete SHOCK. See Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of Ward v. New York State Division of Parole, 26 A.D.3d 712, 809 N.Y.S.2d 671 (3d Dept.), lv. denied, 7 N.Y.3d 702, 818 N.Y.S.2d 193 (2006); Matter of Connelly v. New York State Div. of Parole, 286 A.D.2d 792, 729 N.Y.S.2d 808, 809 (3d Dept.), appeal dismissed 97 N.Y.2d 677, 738 N.Y.S.2d 291 (2001); Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997). The Board acknowledged Appellant's COMPAS instrument indicated low risk in many scales but departed from the COMPAS due to his limited insight. See generally Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017); Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. The Board encouraged him to use the time to complete recommended programs.

The record does not support Appellant's claim that the Board relied on erroneous information. First, Appellant disputes he has outstanding recommended programs in academics, vocational, [redacted] and phase three of Transitional Services as the Board indicated during the interview. He asserts that he has a college degree, finished vocational training, [redacted] and had yet to trigger phase three. Yet, during the interview, he claimed to be currently participating in vocational and [redacted] and to have graduated from high school. In any event, the Board was entitled to rely on information concerning DOCCS' program recommendations and his status contained in official reports. See, e.g., Matter of Silmon, 95 N.Y.2d at 474, 477, 718 N.Y.S.2d at 706, 708; see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). Second, Appellant alleges he was medically unable and did not refuse to complete SHOCK. Again, the Board was entitled to rely on official reports. Third, Appellant disputes there is no release plan on file as indicated during the interview because the Parole Board Report identifies his plan and he explained his plans to the Board. However, the transcript reveals the Board was referring to the absence of letters of assurance and a documented release plan from Appellant that it suggested would be beneficial to him. Moreover, Appellant did not object and the information was not used in the decision as a basis for parole denial. See Matter

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of Khatib v. New York State Bd. of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014); Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017).

The transcript also does not support Appellant's contention that the parole interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). First, Appellant objects to a Commissioner's expression of doubt about his COMPAS during the interview. However, neither the Executive Law nor the Board's regulation obligates the Board to produce evidence to "refute" a COMPAS. Rather, the regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when the Board departs from scales in denying an inmate release. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. The transcript reveals the Commissioner was sharing preliminary disagreement with low scores and inviting Appellant to address the matter. In denying release, the Board ultimately explained its disagreement with the low scores was attributable to Appellant's lack of insight. This assessment was within the Board's authority and was amply supported by the record, which reflects Appellant was unable or unwilling to seriously discuss the causes of his criminal behavior or how things would be different. Second, Appellant contends a Commissioner mischaracterized his "testimony" when observing the only thing that had changed was his partner and location. However, the transcript reveals the Commissioner had questioned how Appellant would be different in his current relationship and Appellant's response focused on his move and new relationship. The observation did not render the interview improper.

Finally, 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); Matter of Grune v. Board of Parole,41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007).

Recommendation: Affirm.