December 2020

Administrative Appeal Decision - Velez, Tomas (2019-05-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Velez, Tomas

Facility: Groveland CF

NYSID: [redacted]

Appeal Control No.: 12-026-18 R

DIN: 07-A-6060

Appearances: Tomas Velez 07A6060
Groveland Correctional Facility
P.O. Box 50
Sonyea, New York 14556

Decision appealed: October 26, 2018 revocation of release and imposition of a time assessment of 15 months.

Final Revocation Hearing Date: October 16, 2018

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

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

Records relied upon: Notice of Violation, Violation of Release Report, Final Hearing Transcript, Parole Revocation Decision Notice

Final Determination: The undersigned determine that the decision appealed is hereby:

_____ Commissioner	✓ **Affirmed**	**___ Reversed, remanded for de novo hearing**	**___ Reversed, violation vacated**
	___ Vacated for de novo review of time assessment only		**___ Modified to** _____
_____ Commissioner	✓ **Affirmed**	**___ Reversed, remanded for de novo hearing**	**___ Reversed, violation vacated**
	___ Vacated for de novo review of time assessment only		**___ Modified to** _____
_____ Commissioner	✓ **Affirmed**	**___ Reversed, remanded for de novo hearing**	**___ Reversed, violation vacated**
	___ Vacated for de novo review of time assessment only		**___ 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 GG.

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

Name:	Velez, Tomas	**DIN:**	07-A-6060
Facility:	Groveland CF	**AC No.:**	12-026-18 R

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Appellant challenges the October 26, 2018 determination of the administrative law judge ("ALJ"), revoking release and imposing a 15-month time assessment. Appellant is on parole for sexually abusing two minor girls. As for this revocation matter, after a contested final parole revocation hearing, appellant was found guilty of having an unauthorized female in his residence. Appellant disputes that the visit by the female was unauthorized at that time. Appellant raises the following issues: 1) a key witness was not permitted to testify at the Preliminary Violation Hearing. 2) mitigating evidence was not heard. 3) DOCCS did not prove its case by a preponderance of the evidence as the parole officer did allow this contact. 4) the sole sustained violation was not a violation in an important respect, as the person visiting his residence later became his wife and he had been allowed contact with her. 5) the time assessment is harsh and excessive. 6) one phone text should not have been excluded. 7) the ALJ was not neutral and detached, but rather acted as a prosecutor and did the job of the PRS. 8) the decision was rendered in violation of the Federal Rules of Criminal Procedure.

Any challenges to the probable cause determination were rendered moot by the final revocation determination. People ex rel. Johnson v. O'Flynn, 141 A.D.3d 1107, 1008, 35 N.Y.S.3d 613 (4th Dept. 2016); People ex rel. David v New York State Div. of Parole, 12 A.D.3d 963, 784 N.Y.S.2d 912, 913 (3d Dept. 2004); People ex rel. Wilt v. Meloni, 166 A.D.2d 927, 561 N.Y.S.2d 673 (4th Dept. 1990); Matter of Collins v. Rodriguez, 138 A.D.2d 809, 525 N.Y.S.2d 728, 729 (3d Dept. 1988). Defects allegedly attending the preliminary revocation hearing are "subsumed" into the final hearing once it is completed, thus rendering the matter moot. Matter of Collins v. Rodriguez, 138 A.D.2d 809, 525 N.Y.S.2d 728, 729 (3d Dept. 1988); see also Matter of Davis v. Laclair, 165 A.D.3d 1367, 1368, 85 N.Y.S.3d 623 (3d Dept. 2018); Matter of Sellers v. Stanford, 144 A.D.3d 691, 40 N.Y.S.3d 501 (2d Dept. 2016); People ex rel. Campolito v. Hale, 70 A.D.3d 1474, 893 N.Y.S.2d 917 (4th Dept. 2010); People ex rel. Frett v. Warden, Rikers Island Corr. Facility, 25 A.D.3d 472, 807 N.Y.S.2d 295 (1st Dept. 2006).

The parole officer testified that the appellant did not have permission on the night in question to have contact with that person in dispute. That testimony, which was deemed to be credible by the ALJ, easily satisfied the evidentiary burden of proof/preponderance of the evidence standard. Credibility issues are left to the discretion of the hearing officer. Matter of Gainey v. Stanford, 157 A.D.3d 1176, 70 N.Y.S.3d 589 (3d Dept. 2018); Osman v. Stanford, 137 A.D.3d 628, 26 N.Y.S.3d 852 (1st Dept. 2016); Matter of Wilson v Evans, 104 A.D.3d 1190, 960 N.Y.S.2d 807 (4th Dept. 2013).

All mitigating evidence, to the extent submitted, was allowed in. Evidence not submitted can't be raised for the first time on appeal. The parolee has the obligation to raise his objection in a timely manner. See, e.g., Matter of Davis v. Laclair, 165 A.D.3d 1367, 1368, 85 N.Y.S.3d 623

APPEALS UNIT FINDINGS & RECOMMENDATION

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(3d Dept. 2018) (issues unpreserved for judicial review as they were not raised at the hearing); Matter of Washington v. Annucci, 144 A.D.3d 1541, 41 N.Y.S.3d 808 (4th Dept. 2016) (waiver by failure to bring an alleged error to the attention of the Administrative Law Judge when he could have corrected); People ex rel. Murray v. New York State Div. of Parole, 95 A.D.3d 1527, 944 N.Y.S.2d 403 (3d Dept. 2012) (waiver by failure to make procedural objections); Matter of McCullough v. New York State Div. of Parole, 82 A.D.3d 1640, 919 N.Y.S.2d 424 (4th Dept.) (failure to object to untimely notice of hearing), leave. den. 17 N.Y.3d 704, 929 N.Y.S.2d 95 (2011).

A mere technical violation is still a violation in an important respect. Rago v Alexander, 60 A.D.3d 1123, 874 N.Y.S.2d 605 (3d Dept. 2009).

Revocation of parole is neither arbitrary nor capricious when the ALJ 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). Revocation is neither arbitrary nor capricious when the ALJ relies on factors defined by New York statute. Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1st Dept. 2019).

The appellant has failed to demonstrate that the ALJ's determination was affected by a showing of irrationality bordering on impropriety. Matter of Silmon v Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2001); Matter of Russo v New York State Board of Parole, 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982 (1980).

There is simply no support in the record for appellant's claim that the administrative law judge was prejudiced or biased against him. Matter of Hampton v. Kirkpatrick, 82 A.D.3d 1639, 919 N.Y.S.2d 422 (4th Dept. 2011); People ex rel. Brazeau v. McLaughlin, 233 A.D.2d 724, 725, 650 N.Y.S.2d 361 (3d Dept. 1996), lv. denied, 89 N.Y.2d 810, 656 N.Y.S.2d 738 (1997). The claim that the Administrative Law Judge crossed the line between factfinder and advocate has been examined and found to be unsubstantiated by the record. Moore v Alexander, 53 A.D.2d 747, 749, 861 N.Y.S.2d 473 (3d Dept. 2008), lv. denied 11 N.Y.3d 710, 872 N.Y.S.2d 72 (2008). There is no merit to the claim the Administrative Law Judge who presided over the hearing was not neutral and detached, as he conducted the hearing in a fair and impartial manner, and the determination of guilt was based upon the evidence presented. Murray v New York State Division of Parole, 95 A.D.3d 1527, 944 N.Y.S.2d 403 (3d Dept. 2012). The inmate has failed to show that the findings in the case by the ALJ flowed from any alleged bias. Ciccarelli v New York State Division of Parole, 11A.D32d

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843, 784 N.Y.S.2d 173, 175 (3d Dept. 2004); Donahue v Fischer, 98 A.D.3d 784, 948 N.Y.S.2d 778 (3d Dept. 2012); Lafferty v Annucci, 148 A.D.3d 1628, 50 N.Y.S.3d 221 (4th Dept. 2017); Leno v Stanford, 165 A.D.3d 1334, 84 N.Y.S.3d 603 (3d Dept. 2018).

For a category 1 violator such as Appellant, the time assessment generally must be a *minimum* of 15 months or a hold to the maximum expiration of the sentence, whichever is less. 9 N.Y.C.R.R. § 8005.20(c)(1). The Executive Law does not place an outer limit on the length of time that may be imposed. Matter of Washington v. Annucci, 144 A.D.3d 1541, 41 N.Y.S.3d 808 (4th Dept. 2016); Matter of Wilson v. Evans, 104 A.D.3d 1190, 1191, 960 N.Y.S.2d 807, 809 (4th Dept. 2013); Murchison v. New York State Div. of Parole, 91 A.D.3d 1005, 1005, 935 N.Y.S.2d 741, 742 (3d Dept. 2012). It is presumed the Administrative Law Judge considered all of the relevant factors. Ramirez v New York State Board of Parole, 214 A.D.2d 441, 625 N.Y.S.2d 505 (1st Dept 1995); Garner v Jones, 529 U.S. 244, 120 S.Ct. 1362, 1371, 146 L.Ed.2d 236 (2000). The time assessment imposed is clearly permissible. Otero v New York State Board of Parole, 266 A.D.2d 771, 698 N.Y.S.2d 781 (3d Dept 1999) leave to appeal denied 95 N.Y.2d 758, 713 N.Y.S.2d 2 (2000); Carney v New York State Board of Parole, 244 A.D.2d 746, 665 N.Y.S.2d 687 (3d Dept 1997); Issac v. New York State Division of Parole, 222 A.D.2d 913, 635 N.Y.S.2d 756 (3d Dept. 1995).

The Federal Rules of Criminal Procedure are not applicable to New York State parole revocation proceedings.

Recommendation: Affirm.