December 2020

Administrative Appeal Decision - Levea, William (2018-12-28)

STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: LEVEA, WILLIAM **Facility**: Fishkill Correctional Facility

NYSID No: [redacted] **Appeal Control #**: 08-068-17 B

Dept. DIN#: 11B0677

Appearances:
For the Board, the Appeals Unit
For Appellant:

Joseph Petito, Esq.
2 Austin Court
Poughkeepsie, New York 12603

Board Member(s) who participated in appealed from decision: Thompson, Alexander, J. Smith.

Decision appealed from: 7/2017 Denial of Discretionary Release; 24-month hold.

Pleadings considered:
Brief on behalf of the Appellant submitted on: October 15, 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), 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 CO.

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

Inmate Name: LEVEA, WILLIAM
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Facility: Fishkill Correctional Facility
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Appellant raises various issues in the brief submitted in support of the administrative appeal he initiated following the Board of Parole's decision to deny his immediate release to community supervision following an interview held on or about July 25, 2017. The brief was signed and submitted by Appellant's counsel. 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 arbitrary and capricious and unlawful, with the Board placing too much weight on Appellant's prior criminal record, and insufficient weight being provided to his institutional achievements; (2) the Board failed to grant [redacted] for Appellant; (3) the Board should not have considered issues relating to Appellant's institutional programming; (4) the Board's decision was made in violation of Appellant's due process rights; (5) the Board's decision lacked sufficient detail; (6) the Board's decision was tantamount to a resentencing of Appellant; (7) the twenty-four month hold imposed by the Board following the interview was excessive; (8) the Board interview was too short in duration; (9) the Board did not provide Appellant with guidance as to how to improve his chances for parole release; and (10) a COMPAS instrument was not prepared for Appellant and therefore not available for the Board's consideration at the time of the interview.

As a preliminary matter, Appellant incorrectly reads Executive Law §259-i(2)(c)(A) as requiring that the Board state in its decision that his release would so deprecate the seriousness of his crime as to undermine respect for the law. The statute only requires that the Board consider that factor, among many others, when making its determination. Appellant also sets forth language purported to be taken from Executive Law §259-i(2)(c)(A)(i)-(v), but the language he provides in his brief does not exactly match the language as it appears in that statute. Additionally, the language set forth by Appellant supposedly contained in 9 NYCRR §8002.3(a) and (b) is not accurate. Continuing, Appellant refers to "guidelines" he claims are contained in "9 NYCRR §8002.3(b)(1)-(3)", but again, the language he provides is inaccurate as the provisions of that regulation were changed substantially some time ago. Finally, Appellant seems to have overlooked major changes in the law governing parole release considerations that substituted the "guidelines" he refers to with "procedures" that incorporate risk and needs principles. This is a major change in the law that took place in 2011. Appellant and his counsel are strongly urged to carefully examine Chapter 62 of the Laws of 2011 and the many major changes that this Chapter made with respect to parole release decisions made by the Board of Parole, and to correct any future appellate brief submissions accordingly.

As to the first issue raised by Appellant in his brief, 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 standards and specifically relied upon standard (1) 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 (1st 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).

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 (1st 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 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).

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 (1st 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.

[redacted]

As to the third issue, the Board must consider Appellant's institutional record when assessing his suitability for possible release to community supervision. See Executive Law §259-i(2)(c)(A); 9 N.Y.C.R.R. §8002.2(d).

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 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, when read against settled case law and the interview transcript, it cannot be said that the reasons provided by the Board in its decision denying Appellant's release to community supervision were improper or proscribed under §259-i(2)(c)(A) of the Executive Law. The reasons provided for denying Appellant's release to community supervision were properly detailed as required by the Executive Law and not stated in conclusory terms, and further, were supported by the record. The Board's decision denying Appellant's release to community supervision is rational and should be sustained. Corley v. New York State Division of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Matter of Dorman v. New York State Board of Parole, 30 A.D.3d 880 (3d Dept. 2006); Matter of Pearl v. New York State Division of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Matter of Cornejo v. New York State Division of Parole, 269 A.D.2d 713 (3d Dept. 2000).

Since the Board's decision was sufficiently detailed to apprise Appellant of the reasons for the denial of parole release, no further detail was necessary. Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677 (3d Dept. 1993). Furthermore, there are no statutory, regulatory or due process requirements that the internal deliberations or discussions of the Board following its interview with a parole eligible inmate appear on the record. Matter of Collins v. Hammock, 96 A.D.2d 733(4th Dept. 1983); Matter of Dow v. Hammock, 118 Misc.2d 462 (Sup. Ct., Wyoming Co., March 31, 1983).

As to the sixth issue, Appellant's claim that the denial of parole release amounted to a resentencing is without merit. Matter of Valentino v. Evans, 92 A.D.3d 1054 (3d Dept. 2012); Matter of Kalwasinski v. Paterson, 80 A.D.3d 1065 (3d Dept. 2011); Matter of Carter v. Evans, 81

A.D.3d 1031 (3d Dept. 2011); Matter of Crews v. New York State Executive Department Board of Parole Appeals Unit, 281 A.D.2d 672 (3d Dept. 2001).

As to the seventh issue, in instances where release to community supervision is denied, the Board shall establish a date for reconsideration which shall not exceed 24 months from the date of the interview. See Executive Law §259-i(2)(a); 9 NYCRR §8002.3(b); Matter of Abascal v. New York State Board of Parole, 23 A.D.3d 740 (3d Dept. 2005); Matter of Tatta v. State, 290 A.D.2d 907 (3d Dept. 2002). Therefore, the 24-month hold was proper.

As to the eighth 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 (1st Dept. 1997).

As to the ninth issue, regarding Appellant's assertion that the Board failed to provide guidance as to how to improve his chances for parole, an inmate has no due process right to a statement from the Board as to what the inmate should do to improve chances for parole. Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979).

As to the tenth issue, a COMPAS instrument was not prepared for Appellant due to cognitive impairment as authorized pursuant to Department of Corrections and Community Supervision Directive 8500.

Finally, 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.