December 2020

Administrative Appeal Decision - Melycher, William (2019-02-27)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Melycher, William **Facility:** Otisville CF

NYSID: [redacted] **Appeal Control No.:** 08-074-18 B

DIN: 11-A-3690

Appearances: William Melycher, 11-A-3690
Otisville Correctional Facility
57 Sanitorium Road
P.O. Box 8
Otisville, New York 10963-0008

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

Board Member(s) who participated: **Alexander, Cruse, Shapiro**

Papers considered: Appellant's Letter-brief received October 31, 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 hearing** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Vacated, remanded for de novo hearing** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Vacated, remanded for de novo hearing** ___ **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 2/27/1966.

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: Melycher, William **DIN:** 11-A-3690

Facility: Otisville CF **AC No.:** 08-074-18 B

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Appellant was sentenced to eight to 20 years upon his conviction of multiple counts of Use of a Child in Sexual Performance. Appellant challenges the July 2018 determination of the Board denying discretionary release with a 24-month hold on the following grounds: (1) the Board unlawfully denied release based solely upon the instant offense without any aggravating factors or proper consideration of his COMPAS and other factors such as his institutional record and release plans; (2) the decision is not supported by objective and/or substantial evidence; (3) the decision amounted to a resentencing; (4) the decision is set forth in conclusory terms; (5) the decision fails to properly explain the departure from COMPAS scales as required by amended 9 NYCRR § 8002.2(a); (6) the 2011 statutory amendments and 2017 regulatory amendments conferred a liberty interest in parole and the Board violated due process by denying Appellant release, denying access to evidence (a D.A. letter), denying him an attorney, and failing to provide a particularized decision; and (7) Appellant was denied due process on appeal when the Board failed to provide the original "hearing" transcript, which might establish alterations in the corrected version. These arguments are without merit.

Preliminarily, Appellant's challenge appears to be based in part upon the mistaken impression that an appearance before the Board is a formal, adversarial hearing in which evidence is introduced and a determination made based upon whether a burden of proof has been met. 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. Executive Law § 259-i(2)(a); 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).

Generally, discretionary release to parole is not to be granted unless the Board determines that an inmate meets three standards: "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). The Board must consider factors relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. Executive Law § 259-i(2)(c)(A). Whereas here the inmate has received an EEC, the Board may deny release to parole on a finding that there is a reasonable probability that, if such inmate is released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Correction Law § 805; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d

502, 503 (1st Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992). An EEC does not automatically guarantee release or eliminate consideration of the statutory factors, including the instant offense. Matter of Corley v. New York State Div. of Parole, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818 (3d Dept. 2006); Matter of Pearl v. New York State Div. of Parole, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817 (3d Dept. 2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006).

While consideration of the statutory 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 Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818. 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 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense involving multiple counts of using a child in a sexual performance wherein Appellant photographed young children – some of whom were in [redacted] – and possessed child pornography created by others; Appellant's prior criminal record; his institutional record including participation in [redacted] and SOP, receipt of an EEC, and clean discipline; and [redacted], get a job, continue counseling, and [redacted]. The Board also had before it and considered, among other things, the sentencing minutes, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet. During the interview, Appellant informed the Board that he has an [redacted] and that he still needs to forgive himself. (Tr. at 4.) When asked about lessons from the [redacted], triggers and coping with an addictive personality in the future, Appellant indicated he did get some things out of the [redacted] but the biggest lesson was that he has to continue counseling on the outside. He explained things came up that he did not feel he could discuss in detail with DOCCS counselors and stated he needs to continue to get help [redacted] (Tr. at 8-9.)

APPEALS UNIT FINDINGS & RECOMMENDATION

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After considering all required factors, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. See generally Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015). In reaching its conclusion, the Board permissibly relied on the instant offense that is an escalation of Appellant's criminal history and statements in the sentencing minutes by the victims' families detailing the harm Appellant's action caused their children and reflecting the judge's opinion. See Executive Law § 259-i(2)(c)(A); Matter of Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), affd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Williams v. New York State Div. of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept. 2014); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998); Matter of Carrion v. New York State Bd. of Parole, 210 A.D.2d 403, 404, 620 N.Y.S.2d 420, 421 (2d Dept. 1994). And while recognizing the COMPAS instrument's overall low risk and need scores, the Board explained it was departing from the COMPAS scores due to its concern – taking into account the magnitude of harm caused to multiple victims and the public's welfare – that his rehabilitation may not be complete in view of his statements about his addictive personality and struggles to forgive himself. See Executive Law § 259-i(2)(c)(A); 9 NYCRR § 8002.2(a).

While the Board may place greater weight on the nature of the offense 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, the Board relied on additional considerations here. Moreover, the reasons stated by the Board members for holding Appellant are sufficient grounds to support their decision. There are no substantial evidence issues. 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); cf. Matter of Horace v. Annucci, 133 A.D.3d 1263, 20 N.Y.S.3d 492 (4th Dept. 2015).

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). Similarly unavailing is Petitioner's attempt to infer a "reasonable expectation of parole" after the minimum sentence from a single statement in 1977 by the then Governor concerning cases in which the Board set the minimum period of incarceration under repealed Section 259-i(1). See Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 74-76, 427 N.Y.S.2d 982, 984-85 (1980) (quoting complete statement and concluding guidelines created no entitlement to release at any particular time because the system is discretionary). Likewise, arguments predicated on application of Executive Law § 259-i(2)(c)(A)'s third standard are incorrect but also misplaced inasmuch the Board relied on the first and second standards in denying release. And while community opposition is a permissible consideration, see Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, --N.Y.S.3d-- (3d Dept. 2018); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, --N.Y.S.3d-- (1st Dept. 2018), the Board did not rely upon community opposition in denying parole. We also note the Board did not rely on penal philosophy.

Contrary to Appellant's claim, the Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. 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); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations: namely, the instant offense, the harm his action caused, and concern that his rehabilitation is not yet complete. The Board's decision also complied with 9 N.Y.C.R.R. § 8002.2(a) by providing an individualized reason for departing from low COMPAS scores and permissibly did so by addressing low scores collectively.

Appellant's due process claims also are without merit. An inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005). Even where a parole scheme implicates due process, courts recognize it is satisfied by providing the inmate with an opportunity to be heard and notice of the reasons for denial. See Greenholtz, 442 U.S. at 16, 99 S. Ct. at 2108. Appellant received both here.

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Contrary to Appellant's assertions, neither the 2011 amendments to the Executive Law nor the 2017 amendments to the Board regulations altered these principles. In 2011, the Executive Law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014). However, the COMPAS is *not* predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Amended 9 NYCRR § 8002.2(a), in turn, seeks to increase transparency in Board decisions by providing an explanation when the Board departs from COMPAS scores in denying release. The amendments did not change the standards the Board is required to apply when deciding whether to grant parole, nor did they eliminate the Board's discretion under Executive Law § 259–i(2)(c)(A). See, e.g., Matter of Banks v. Stanford, 159 A.D.3d 134, 141, 143-44, 71 N.Y.S.3d 515, 521-22 (2d Dept. 2018); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Thus, there is no merit to Appellant's claim that the amendments conferred a protected liberty interest in parole much less gave rise to the specific requirements he seeks to impose. See Ellison v. Evans, No. 13 CIV. 885 KBF, 2013 WL 5863545, at *3 (S.D.N.Y. Oct. 31, 2013) ("Contrary to plaintiffs' argument [ ], the Second Circuit's decision in *Barna* is not "outdated" in light of subsequent amendments to the New York parole statute"), aff'd sub nom. Fuller v. Evans, 586 F. App'x 825 (2d Cir. 2014) ("Appellants have pointed to no specific language in any version of the statute that might create a legitimate expectancy of release and thereby give rise to a due process interest in parole"), cert. denied sub nom. Ellison v. Evans, 135 S. Ct. 2807, 192 L. Ed. 2d 851 (2015); cf. Hodge v. Griffin, No. 13 CIV. 1977 LTS JCF, 2014 WL 2453333, at *2 (S.D.N.Y. June 2, 2014) (rejecting due process claim). Appellant's reliance on Linares v. Annucci, 710 Fed. Appx. 467 (2d Cir. 2017), is misplaced, as the Court remanded the case without reaching the merits whereupon the plaintiff voluntarily dismissed the action.

Turning to Appellant's specific allegations, we note the interview is not an adversarial proceeding and there is no right to have an attorney present on behalf of the inmate. McCall v. Pataki, 232 F.3d 321, 323 (2d Cir. 2000); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970). In addition, Appellant has failed to establish he requested and was denied access to a letter from the District Attorney. In any event, a review of the record reveals there are no official statements. As discussed above, the decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole. And

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arguments predicated on rehabilitation are incorrect and misplaced inasmuch as the Board expressed concern about Appellant's progress.

As for complaints about the interview transcript, Appellant received the correct version in response to his transcript request. The Appeals Unit committed no error when it did not also provide a prior, incorrect version. Nonetheless, the Appeals Unit has since provided a copy in response to Appellant's request and allowed Appellant an opportunity to supplement his submission within 30 days, which he declined to do. A review of the record reflects that the transcript was corrected solely to make formatting changes. We therefore find no merit to Appellant's suggestion that the transcript was altered. Matter of Davis v. Laclair, 165 A.D.3d 1367, 1368, 85 N.Y.S.3d 623 (3d Dept. 2018); Matter of Graham v. New York State Div. of Parole, 269 A.D.2d 628, 702 N.Y.S.2d 708, 710 (3d Dept.), lv. denied, 95 N.Y.2d 753, 711 N.Y.S.2d 155 (2000).

Recommendation: Affirm.