May 2021

Administrative Appeal Decision - Barnett, Jerome (2020-01-16)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Barnett, Jerome **Facility:** Cape Vincent CF

NYSID: [redacted] **Appeal Control No.:** 04-092-19 B

DIN: 18-A-2589

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

Decision appealed: April 2019 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Coppola, Drake**

Papers considered: Appellant's Brief received August 19, 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:

_____ ✓ **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 1/16/20 (AH)

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 convicted of Burglary in the third degree and is serving an aggregate term of two and a half years to six years and five months. Appellant refused to attend his initial Parole Board Interview in April 2019. After a review of the record and deliberation, the Board denied release and imposed a 24-month hold. In the instant appeal, Appellant challenges the Board's April 2019 determination on the following grounds: (1) the decision was arbitrary and capricious because the Board failed to properly consider all statutory factors such as his positive institutional adjustment; (2) the decision was arbitrary and capricious because the Board relied exclusively on the instant offense and Appellant's criminal history; (3) the Board failed to comply with Executive Law § 259-c(4) because his COMPAS instrument was incomplete and the Board ignored the COMPAS instrument's low score for history of violence; and (4) Appellant was denied due process because the Board was biased and relied on erroneous information. 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). 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).

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant burglary offense stemming from three incidents while Appellant was on parole; Appellant's criminal history including five prior State terms of incarceration and multiple parole violations; his institutional record including discipline, work as a porter, and that Appellant has yet to complete all recommended programs such as ART; [redacted]; and information provided concerning release plans. The Board had before it and considered, among other things, the pre-sentence investigation report, the Parole Board Report, 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 Appellant's lengthy history of criminal conduct, the instant offense that represents a continuation of larcenous behaviors and is his sixth State term, his prior failures on parole and that he was still on parole when he committed the instant offense, and that Appellant had not yet completed all recommended programs. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Bello v. Bd. of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Matter of Byas v. Fischer, 120 A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); 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 may consider an inmate's need to complete rehabilitative programming even where a delay in commencement is through no fault of the inmate. See Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857.

Appellant's contention that the Board failed to comply with section 259-c(4) of the Executive Law is without merit. The record reflects that the COMPAS instrument was incomplete because Appellant refused to complete the "self efficacy" portion of the assessment. To the extent completed, scores were high for criminal involvement and prison misconduct, probable for reentry substance abuse, and highly probable for low family support. That the Board did not specifically mention in its decision his low score for history of violence does not constitute convincing evidence that the Board did not consider it or render the decision irrational bordering on impropriety. See Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017); Matter of Dolan v. New York State Bd. of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014), lv. denied, 24 N.Y.3d 915, 4 N.Y.S.3d 601 (2015).

As for Appellant's due process claim, 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); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). 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).

Appellant's specific allegations of bias and error likewise lack merit. There is no support in the record to prove an alleged bias or 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. There also is no support for the claim that the Board relied on erroneous information.

First, Appellant – while acknowledging he refused to attend his initial Parole Board Interview in April 2019 – argues he was never informed of the first Board interview he was eligible for during his incarceration in county jail pursuant to the instant offense and DOCCS reported he declined to attend in retaliation for a lawsuit. However, Appellant was convicted in the instant offense and received by DOCCS in June 2018. Appellant's parole eligibility date was August 8, 2019, and his initial interview was scheduled for April 2019.

Second, Appellant objects that the COMPAS was incomplete. But as noted above, this was due to Appellant's refusal to complete part of the assessment.

Third, Appellant contends his time computation was modified to postpone his Conditional Release date in retaliation for his lawsuit. The Board's determination with respect to discretionary release is a distinct basis for release that has no impact on conditional release. Any challenges to his time computation are beyond the scope of the Board's jurisdiction. 9 NYCRR § 8006.3; id. §§ 8006 *et seq*.

Fourth, Appellant argues the Board effectively resentenced him. This claim 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 appellant has not in any manner been

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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).

Fifth, Appellant contends the Board did not consider [redacted] While Appellant declined to appear before the Board, the Board considered the record and [redacted] information contained therein. It does not render the Board's decision irrational bordering on impropriety. See Matter of Tatta v. State, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163, 164 (3d Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); Matter of Trobiano v. State Div. of Parole, 285 A.D.2d 812, 728 N.Y.S.2d 269 (3d Dept. 2001).

Finally, Appellant asserts the Board did not consider his parole history and that he successfully completed his prior parole terms. However, the Board's characterization of his parole history is supported by the record. Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d at 474, 477, 718 N.Y.S.2d at 706, 708; Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976).

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." Matter of Silmon v. Travis, 95 N.Y.2d at 476, 718 N.Y.S.2d 704 (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982.

Recommendation: Affirm.