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Administrative Appeal Decision - Buie, Eugene (2020-01-16)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Buie, Eugene **Facility:** Cape Vincent CF

NYSID: [REDACTED] **Appeal Control No.:** 04-005-19 B

DIN: 16-A-1837

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

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

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

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:

[Signature] / Affirmed ___ Vacated, remanded for de novo interview ___ Modified to ___
Commissioner

[Signature] / Affirmed ___ Vacated, remanded for de novo interview ___ Modified to ___
Commissioner

[Signature] / 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 *(AK)*

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant was sentenced to three and a half to seven years upon his conviction of Robbery in the third degree. In the instant appeal, Appellant challenges the March 2019 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 properly consider all statutory factors such as program accomplishments, receipt of an EEC and merit time certificate, and release plans; (2) the decision is arbitrary and capricious because the Board relied exclusively on the instant offense and Appellant's criminal history; (3) the Board failed to rebut the presumption of readiness for release pursuant to the EEC; and (4) the Board may have relied on erroneous information about the instant offense. These arguments are without merit.

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 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 Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818. In the absence of a convincing demonstration that

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APPEALS UNIT FINDINGS & RECOMMENDATION

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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 robbery offense during which Appellant, while under the influence of K-2, held a box cutter to a store employee; Appellant's criminal history including two prior State terms and that he is a registered sex offender with a history of parole violations; his institutional record including educational efforts, completion of ART and [REDACTED], receipt of an EEC and merit time, and good disciplinary record; [REDACTED] and release plans to work with church organizations and other service providers. The Board had before it and considered, among other things, the pre-sentence investigation report, the Parole Board Report, Appellant's case plan, the COMPAS instrument, and letters of assurance.

After considering all required factors and principles, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. In reaching its conclusion, the Board permissibly relied on the instant offense, Appellant's criminal history including prior parole violations, and the COMPAS instrument's medium risk for recidivist behavior. Executive Law §§ 259-c(4), 259-i; Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017); Matter of Singh v. Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept.), lv. denied, 24 N.Y.3d 906, 995 N.Y.S.2d 715 (2014). The Board encouraged Appellant to complete his GED, continue staying clean, and maintain his good discipline. The Board acted within its discretion in determining these considerations rebutted any presumption created by the EEC and rendered discretionary release inappropriate at this time. See generally Matter of Neal v. Stanford, 131 A.D.3d 1320, 16 N.Y.S.3d 342 (3d Dept. 2015).

Appellant disputes that he was under the influence of drugs when he committed the instant offense and contends the Board may have relied on erroneous information. However, the Parole Board Report indicates he admitted during his pre-board interview that he was high on K-2 that day. As such, there is no basis to disturb the Board's decision.

Recommendation: Affirm.