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Administrative Appeal Decision - Espinal, Cesar (2020-03-16)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Espinal, Cesar		**Facility:**	Marcy CF
NYSID: [redacted]		**Appeal Control No.:**	07-008-19 B
DIN: 91-A-6659			

Appearances: Cesar Espinal, 91-A-6659
Marcy C.F.
9000 Old River Road
P.O. Box 5000
Marcy, NY 13403-5000

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

Board Member(s) who participated: **Crangle, Cruse**

Papers considered: Appellant's Brief received November 1, 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:

_____ Commissioner — ✓ **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** ________

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 03/16/2020 66

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: Espinal, Cesar **DIN:** 91-A-6659

Facility: Marcy CF **AC No.:** 07-008-19 B

Appellant was sentenced to an aggregate term of 15 years to life upon his conviction of Murder in the second degree, two counts of Robbery in the first degree, and Attempted Assault in the second degree. In the instant appeal, Appellant challenges the June 2019 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the decision was arbitrary and capricious because the Board placed undue emphasis on Appellant's criminal behavior; (2) the decision was not supported by substantial evidence; (3) the Board relied on erroneous information in the COMPAS with respect to substance abuse and this indicates bias; (4) the Board's reliance on a recent infraction was unsupported; and (5) the decision is arbitrary and capricious in view of Appellant's deportation order. 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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007). 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).

Parole Board release decisions made in accordance with the law will not be disturbed unless irrational "bordering on impropriety." Matter of Silmon, 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 (1980)).

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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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses involving two in-concert gunpoint robberies during which one woman was shot, the shooting death of a guard by Appellant during the attempted robbery of an armored car, and a fight with a corrections officer in county jail; Appellant's criminal history; his institutional record including completions of [redacted] and ART and extensive discipline with a new infraction since his last appearance; a deportation order; and release plans in the [redacted]. The Board also had before it and considered, among other things, official D.A. statements, Appellant's case plan, the COMPAS instrument, and an attorney packet and letters of support.

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 the instant offenses, Appellant's prior unlawful conduct, the COMPAS instrument's elevated score for reentry substance abuse, and the fact that he incurred a new infraction since his last appearance. See, e.g., Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (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 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); Matter of Thurman v. Hodges, 292 A.D.2d 872, 873, 739 N.Y.S.2d 324 (4th Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002).

Appellant disputes the reentry substance abuse score in his COMPAS instrument, arguing it should be lower in light of his completion of [redacted] in 2017. The Board does not determine COMPAS scores and an administrative appeal to the Board is not the proper forum to challenge the COMPAS instrument. We also note the record reveals Appellant's drug/alcohol use continued [redacted] Thus, the Board's concern was reasonable notwithstanding the fact that he completed [redacted] again. There is no record support 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 (3d Dept. 2017).

The Board's consideration of Appellant's new infraction was appropriate. Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official

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reports and may rely on the information contained therein. See, e.g., Matter of Silmon, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 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). Insofar as Appellant asserts the infraction was a ruse used by the State to remove him from danger, his unsupported allegation – which also is inconsistent with his statement to the Board – does not provide a basis to disturb the decision.

Finally, Appellant's "contention that, given the deportation order, it was irrational to conclude that his release would be incompatible with the welfare and safety of the community" is without merit. Matter of Kelly v. Hagler, 94 A.D.3d 1301, 942 N.Y.S.2d 290 (3d Dept. 2012); see also Matter of Hunter v. New York State Div. of Parole, 21 A.D.3d 1178, 800 N.Y.S.2d 799 (3d Dept. 2005).

Recommendation: Affirm.