May 2021

Administrative Appeal Decision - Kent, Jack (2020-02-04)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Kent, Jack **Facility:** Fishkill CF

NYSID: [redacted] **Appeal Control No.:** 04-038-19B

DIN: 95-A-4071

Appearances: Andre Sedlak, Esq.
11 Market, Suite 205
Poughkeepsie, New York 12601

Decision appealed: March 2019 decision denying discretionary release and imposing a hold of 18 months.

Board Member(s) who participated: **Berliner, Davis, Shapiro**

Papers considered: Appellant's Brief received September 17, 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 2/4/2020 (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 is serving an aggregate term of 25 to 50 years upon his conviction of Sodomy in the first degree, Rape in the first degree, and Sexual Abuse in the first degree. In the instant appeal, Appellant, through counsel, submits a 101-page brief to serve as the perfected appeal challenging the March 2019 determination of the Board denying release and imposing a 18-month hold on the following grounds:

1) the decision was unlawful, arbitrary and capricious because it was based solely on the nature of the offense in violation of Executive Law §§ 259-i and 259-c(4);
2) the decision was unlawful, arbitrary and capricious because the Board overemphasized Appellant's prior record;
3) the decision was unlawful, arbitrary and capricious because the Board failed to adequately consider Appellant's positive accomplishments, release plans and other factors;
4) the decision was unlawful, arbitrary and capricious because the Board held Appellant's lack of participation in specific programs against him;
5) the decision was unlawful, arbitrary and capricious because the Board considered Appellant's juvenile [redacted] history;
6) the decision was unlawful because the Board failed to consider whether there is a reasonable probability that, if released, Appellant will live and remain at liberty without violating the law;
7) the Board regulations, which became effective July 30, 2014, do not satisfy Executive Law § 259-c(4);
8) the decision was unlawful, arbitrary and capricious because the Board failed to adequately consider Appellant's COMPAS instrument;
9) the decision was unlawful, arbitrary and capricious because the Board failed to utilize a Transitional Accountability Plan (TAP);
10) the decision constitutes an unlawful resentencing;
11) the Board was biased because they retried and interrogated Appellant;
12) the Board conducted the interview in a "biased, prejudiced, incomplete and slipshod manner";
13) the Board unlawfully abdicated its discretion and instead based its decision on an executive policy with respect to violent felons;
14) the decision fails to adequately state the reasons for the denial in violation of Executive Law § 259-i and due process;
15) the 18-month hold is excessive, arbitrary and capricious;
16) the decision was unlawful, arbitrary and capricious because the Board failed to consider or grant Appellant [redacted] parole; and
17) appellate counsel was improperly denied access to the complete Parole Board Report.

These arguments are without merit.

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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).

In 2011, the law was amended to further 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors, including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS instrument cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017).

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,

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139 A.D.3d 1068, 30 N.Y.S.3d 834. 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 stemming from the sexual abuse of Appellant's two young step-daughters; a prior misdemeanor conviction for sex abuse second [redacted] his institutional record including good discipline, completion of ART and vocational training, and refusal of SOP and [redacted] and release plans to finish college and ultimately relocate to Maine. The Board had before it and considered, among other things, the sentencing minutes, an official District Attorney letter, Appellant's offender case plan (the new name of the TAP), 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 the nature of the instant offense involving the sexual abuse of two young girls, official opposition to release, that Appellant is refusing SOP and [redacted] and the lack of a well formed release plan. See Executive Law § 259-i(2)(c)(A); Matter of Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Yourdon v. New York State Div. of Parole, 32 A.D.3d 1065, 1066, 820 N.Y.S.2d 366, 367 (3d Dept. 2006), lv. denied, 8 N.Y.3d 801, 828 N.Y.S.2d 292 (2007); Matter of Bockeno v. New York State Parole Bd., 227 A.D.2d 751, 642 N.Y.S.2d 97 (3d Dept. 1996). In this regard, the Board encouraged Appellant to develop a written plan that addresses his housing and reentry support needs. See Executive Law § 259-i(2)(c)(A).

Contrary to Appellant's claim, the Board committed no error in considering his program refusals. See Executive Law § 259-i(2)(c)(A); 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 Bockeno, 227 A.D.2d 751, 642 N.Y.S.2d 97. The Board also committed no error in considering Appellant's [redacted] See Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017); Matter of Amen v. New York State Div., 100 A.D.3d 1230, 954 N.Y.S.2d 276 (3d Dept. 2012); Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011). The Board correctly distinguished Appellant's [redacted] from his misdemeanor and felony record. Cf. Matter of Hughes v. New York State Div. of Parole, 21 A.D.3d 1176, 1177, 800 N.Y.S.2d 854, 854 (3d Dept. 2005).

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The Board also provided an adequate statutory rationale for denying parole. Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); cf. Matter of Vaello v. Parole Bd. Div. of State of New York, 48 A.D.3d 1018, 1019, 851 N.Y.S.2d 745, 746–47 (3d Dept. 2008). A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d at 477, 718 N.Y.S.2d at 708; Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

Insofar as Appellant alleges the 2011 amendments to the Executive Law represented a shift in the legal regime governing parole determinations requiring a focus on forward-looking factors, this proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. As noted, the Board still must conduct a case-by-case review of each inmate by considering all statutory factors. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. Thus, even where the Appellate Division has "take[n] the unusual step of affirming the annulment of a decision of [the Board]", it has nonetheless reiterated that "[t]he Board is not obligated to refer to each factor, or to give every factor equal weight" and rejected any requirement that the Board prioritize "factors which emphasize forward thinking and planning over the other statutory factors." Matter of Rossakis v. New York State Bd. of Parole, 146 A.D.3d 22, 29 (1st Dept. 2016). Appellant's additional challenge to former 9 N.Y.C.R.R. § 8002.3 (2014) – which is incorrect – is misplaced inasmuch as the regulation was repealed in 2017. Moreover, the record reflects the Board properly considered Appellant's COMPAS instrument and offender case plan together with the statutory factors. See Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870.

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); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 820 N.Y.S.2d 661 (3d Dept. 2006). Similarly, the Board did not retry and interrogate him. See Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017).

Appellant's additional allegations about the conduct of his interview are without merit. The nature and extent of a parole interview are solely within the Board's discretion. Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28-29, 298 N.Y.S.2d 704, 710 (1969). The transcript does not support Appellant's contention that the interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays, 55 N.Y.S.3d 502, 150 A.D.3d 1521; Matter of Bonilla, 32 A.D.3d 1070, 820 N.Y.S.2d 661. 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, 153 A.D.3d 1021, 56 N.Y.S.3d 896.

There is no merit to the apparent claim that the decision was predetermined based on an alleged executive policy to deny parole to violent felony offenders. Allegations that the Board has systematically denied parole to prisoners convicted of violent crimes have been dismissed repeatedly by the Courts. See, e.g., Matter of Cartagena v. Alexander, 64 A.D.3d 841, 882 N.Y.S.2d 735 (3d Dept. 2009); Matter of Motti v. Dennison, 38 A.D.3d 1030, 831 N.Y.S.2d 298 (3d Dept. 2008); Matter of Cardenales v. Dennison, 37 A.D.3d 371, 830 N.Y.S.2d 152 (1st Dept. 2007); Matter of Wood v. Dennison, 25 A.D.3d 1056, 1057, 807 N.Y.S.2d 480, 481 (3d Dept. 2006); Matter of Ameyda v. Travis, 21 A.D.3d 1200, 800 N.Y.S.2d (3d Dept. 2005), lv. denied, 6 N.Y.3d 703, 811 N.Y.S.2d 335 (2006); Matter of Bottom v. Travis, 5 A.D.3d 1027, 773 N.Y.S.2d 717 (4th Dept.), appeal dismissed 2 N.Y.3d 822, 781 N.Y.S.2d 285 (2004).

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 nature of the offense involving two young victim's, official opposition, program refusals and the lack of a well formed release plan. The Board is not required to state what an inmate should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d

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797 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014). Indeed, there is no requirement that a second Board panel follow the recommendation of a prior Board panel. Matter of Flores v New York State Bd. of Parole, 210 A.D.2d 555, 620 N.Y.S.2d 141, 142 (3d Dept. 1994). Nonetheless, the Board provided Appellant with suggestions for the future.

Insofar as Appellant also asserts a due process claim, 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 v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); 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).

The Board's decision to hold an inmate for a maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that an 18-month hold for discretionary release was excessive or improper.

In addition, the appellant is perfectly free to apply for special [redacted] parole release – an option he has apparently chosen not to pursue. Executive Law §§ 259-r, 259-s. It is a discretionary decision by the Commissioner of Correction whether to certify an inmate to the Board for [redacted] release. Matter of Ifill v. Wright, 94 A.D.3d 1259, 941 N.Y.S.2d 812 (3d Dept. 2012).

As for access to confidential sections of the Parole Board Report for the appeal, there was no impropriety as the Board may consider confidential information. Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014). An inmate has no constitutional right to the information in his parole file, Billiteri v. U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976), and generally is not entitled to confidential material, Matter of Justice v. Comm'r of New York State Dep't of Corr. & Cmty. Supervision, 130 A.D.3d 1342, 15 N.Y.S.3d 853 (3d Dept. 2015); Matter of Perez v. New York State Div. of Parole, 294 A.D.2d 726, 741 N.Y.S.2d 753 (3d Dept. 2002); Matter of Macklin v. Travis, 274 A.D.2d 821, 711 N.Y.S.2d 915, 916 (3d Dept. 2000). We also note Appellant's claim does not provide a basis to disturb the Board's determination. See Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018).

Recommendation: Affirm.