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Administrative Appeal Decision - Mayo, Marcus E (2020-03-10)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Mayo, Marcus Facility: Watertown CF
NYSID: [REDACTED] Appeal Control No.: 05-215-19 B
DIN: 17-B-3121

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 15 months.

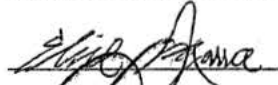

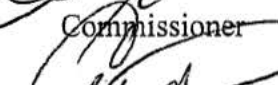
Board Member(s) who participated: **Drake, Berliner**

Papers considered: Appellant’s Brief received October 25, 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 3/10/2020 66.

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant was sentenced to two to four years upon his conviction of CPW in the third degree. In the instant appeal, Appellant challenges the April 2019 determination of the Board denying release and imposing a 15-month hold on the following grounds: (1) the decision is arbitrary and capricious because the Board failed to meaningfully consider required factors such as his positive institutional adjustment and release plans; (2) the decision is arbitrary and capricious because the Board relied exclusively on the instant offense and Appellant’s criminal history; and (3) the Board failed to rebut the presumption that he is ready for release pursuant to his EEC. 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016). In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must

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APPEALS UNIT FINDINGS & RECOMMENDATION

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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 offense where Appellant was found with a handgun following an argument with his girlfriend; Appellant's out of state criminal history; his substance abuse history; his institutional record including completion [REDACTED] and vocational trade, receipt of an EEC, educational efforts, outstanding program needs and absence of new discipline; and release plans to work, explore the military or return to school for mechanic. The Board also had before it and considered, among other things, the pre-sentence investigation report, Appellant's case plan, the COMPAS instrument, and letters of support.

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 prior criminal history, elevated scores in the COMPAS instrument, that Appellant displayed a lack of accountability and insight into his criminal behaviors during the interview, and the absence of a documented release plan. See Executive Law §§ 259-c(4), 259-i(2)(c)(A); Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; 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 Fuchino, 255 A.D.2d at 914, 680 N.Y.S.2d at 390. The Board encouraged him to enter and complete ART and Transitional Services 2 to gain insight, develop a documented release plan, and work with counselors to connect with and obtain letters of assurance from reentry programs that will assist with educational/vocational goals and [REDACTED] to support a successful transition back into the community. See Executive Law §§ 259-c(4), 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). 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).

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, 95 N.Y.2d 470, 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)).

Recommendation: Affirm.