May 2021

Administrative Appeal Decision - Miller, Daniel (2020-03-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Miller, Daniel **Facility:** Franklin CF

NYSID: [redacted] **Appeal Control No.:** 09-154-19 B

DIN: 15-A-3706

Appearances: Daniel Miller, 15-A-3706
Franklin Correctional Facility
62 Bare Hill Road
P.O. Box 10
Malone, NY 12953-0010

Decision appealed: September 2019 decision, denying discretionary release and imposing a hold to the Maximum Expiration date.

Board Member(s) who participated: **Agostini, Cruse, Corley**

Papers considered: Appellant's Brief received October 21, 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 GG.

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 challenges the September 2019 determination of the Board, denying release and imposing a hold to the Maximum Expiration date. Appellant is incarcerated for multiple instant offenses. In one, Appellant stole property from banks and check cashing services on four separate occasions, with the amounts of the thefts in excess of $3,000 in three of the cases and in excess of $50,000 in the fourth one. In the second instant offense, Appellant abducted the 17-year-old male victim, drugged him, and subjected him to sexual acts while the victim was incapacitated. In the third instant offense, while Appellant was an inmate at a county correctional facility, Appellant asked a confidential source to arrange for the killing of the victim, who was a witness against him in the criminal case. Appellant raises the following issues: 1) the Board did not adequately [redacted] when making its determination; 2) the special condition related to [redacted] violates Appellant's right of free choice, [redacted], and unlawfully compels Appellant' to delegate [redacted] 3) the special condition related to restrictions on computers, internet access, smart phones, and social media is overly broad, unconstitutional, and imposes a retraction on Appellant's ability to work in his chosen profession; and 4) the 1000-foot rule restricting access to school grounds is overly broad, unconstitutional, violates Appellant's due process rights. 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 LeGeros

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v. New York State Bd. Of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); 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 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); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses of Criminal Sexual Act in the first degree, three counts of Sexual Abuse in the first degree, two counts of Attempted Criminal Sexual Act in the first degree, four counts of Facilitating a Sex Offense with a Controlled Substance, Kidnapping in the second degree, Conspiracy in the second degree, Criminal Solicitation in the second degree, Grand Larceny in the second degree, and three counts of Grand Larceny in the third degree; Appellant's criminal history including two prior state terms of incarceration, twelve felonies, nine misdemeanors, federal convictions, and violation of supervision; [redacted] Appellant's institutional efforts including four Tier II misbehavior reports, multiple program refusals resulting in the denial of an EEC, [redacted]; and release plans to live with his mother and work from home using his computer skills. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, and Appellant's parole packet featuring release plans and letters of support and assurance.

After considering all required factors, 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 criminal history, and failure to complete recommended programming. See Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1273-74, 990 N.Y.S.2d 714, 719 (3d Dept. 2014); Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 128-29, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998); Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Matter of Lashway v. Evans, 110 A.D.3d 1417, 1418, 974 N.Y.S.2d 164, 165 (3d Dept. 2013); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 550 N.Y.S.2d 204 (3d Dept. 1990); 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 Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997). The Board also cited elevated scores in the COMPAS instrument. See Matter of Espinal v. N.Y. State Bd. Of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019).

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Appellant's contention that the Board did not adequately consider Appellant's [redacted] when making its determination is without merit. A review of the transcript reflects the Board directly discussed Appellant's [redacted] twice during the interview (Tr. at 11, 14.) and [redacted] when given the opportunity to raise additional matters at the end of the interview. (Tr. at 16.) The Board considered [redacted] and denied release in light of factors such as the serious instant offenses and Appellant's lengthy criminal record.

As for Appellant's arguments regarding special conditions and the 1000-foot rule, this is an improper forum to challenge them as the issues are beyond the jurisdiction of the Appeals Unit. See 9 NYCRR 8006.3.

Recommendation: Affirm.