May 2021

Administrative Appeal Decision - Redko, Leonid (2020-03-16)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Leonid, Redko **Facility:** Otisville CF

NYSID: [redacted] **Appeal Control No.:** 06-119-19 B

DIN: 15-A-5131

Appearances: Christina Myers, Esq.
Greene County Public Defender
Greene County Office Building
411 Main Street, 2nd Floor
Catskill, New York 12414

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

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

Papers considered: Appellant's Letter-brief received October 24, 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 03/16/2020 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 was sentenced to three to nine years upon his conviction of Manslaughter 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 is arbitrary and capricious because the Board relied solely on the instant offense without citing any aggravating factors or properly weighing other factors such as that this his first arrest/incarceration and there was no criminal intent, his program completions, his receipt of an EEC, the case plan, and letters of support; (2) the Board failed to overcome the EEC presumption of release; (3) the Board unlawfully usurped the role of the sentencing judge and resentenced him; (4) the Board failed to comply with Executive Law § 259-c(4) by conducting a future-focused assessment analysis and its use of the COMPAS assessment was flawed because there was no basis to depart from the reentry substance abuse score; (5) the Board relied on incorrect information concerning official opposition because the D.A. letter was submitted in 2016; (6) the Board relied on erroneous information from an old case plan; and (7) Appellant requested and was denied the opportunity to review his parole folder before the interview. 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. 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).

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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 at 1143, 822 N.Y.S.2d at 818. 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 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.

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)). 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 offense wherein Appellant drove his vehicle in excess of 100 mph and struck two victims on the sidewalk, causing their deaths; his explanation for speeding and information presented [redacted]; that the instant offense represents his first term of NYS incarceration; his institutional record including program completions such as [redacted] ART, receipt of an EEC, and disciplinary infractions with a new drug use ticket since his last appearance; and release plans including an employment opportunity with a friend. The Board also had before it and considered, among other things, Appellant's case plan, the COMPAS instrument, an official D.A. statement in opposition to release, an official statement by defense counsel in support of release, Appellant's submission and letters of support/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 misbehavior reports, and official opposition. See, e.g., Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Furman v. Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016); Matter of Abascal v. New York State Bd. of Parole, 23 A.D.3d 740, 741, 802 N.Y.S.2d 803, 804 (3d Dept. 2005); Matter of Walker v. New York State Bd. of Parole, 218 A.D.2d 891, 630 N.Y.S.2d 417 (3d Dept. 1995). The Board noted the COMPAS instrument's high prison misconduct score and departed from the "unlikely" score for reentry substance abuse based on Appellant's drug use while incarcerated. See Executive Law 259-c(4); 9 N.Y.C.R.R. § 8002.2(a). 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'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).

Appellant's additional contention that the Board failed to comply with section 259-c(4) of the Executive Law is likewise without merit. Section 259-c(4) requires procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). This is encompassed in the Board's regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments to the Executive Law 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 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).

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That is exactly what occurred here. The Board considered Appellant's COMPAS instrument – which is not uniformly low – but disagreed with the reentry substance abuse score as it is entitled to do. See 2011 N.Y. Laws ch. 62, § 1, part C, § 1, subpart A, § 1; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. Moreover, the Board's explanation is supported by the record, which reflects Appellant has incurred multiple drug infractions while incarcerated including since his last appearance before the Board.

The Board committed no error in its consideration of official D.A. opposition. Executive Law § 259-i(2)(c)(A)(vii) requires the Board to consider recommendations of the sentencing court, the inmate's attorney, and the "district attorney." As such, the Board was obligated to consider the official D.A. statement it received. Appellant's suggestion that recommendations expire is baseless.

The Board also did not rely on erroneous information relating to the case plan. The interview transcript reflects that the Board recognized and considered Appellant's completion [redacted]. When asked why his case plan contained a goal to return to [redacted], Appellant indicated the goal was old and the Board accepted his response. See Matter of Perea v. Stanford, 149 A.D.3d 1392, 53 N.Y.S.3d 231 (3d Dept. 2017). And while our review reveals Appellant had a later dated (April 2019) case plan that was not made available to the Board at the time of the interview, it contained the same information as the (December 2018) case plan before the Board. As such, any error was harmless. See Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of Davis v. Lemons, 73 A.D.3d 1354, 899 N.Y.S.2d 919 (3d Dept. 2010).

Finally, the record indicates Appellant was in fact given the opportunity to review 75 pages from his parole file prior to his appearance before the Board.

Recommendation: Affirm.