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May 2021

### Administrative Appeal Decision - Russo, Kelly A (2020-02-04)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Russo, Kelly

Facility: Bedford Hills CF

NYSID: [REDACTED]

Appeal Control No.: 09-050-19 B

DIN: 18-G-1019

Appearances: Kelly Russo, 18-G-1019  
Bedford Hills Correctional Facility  
247 Harris Road  
Bedford Hills, NY 10507-2400

Decision appealed: August 2019 decision, denying discretionary release and imposing a hold of 12 months.


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

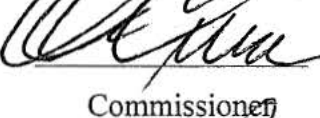
Papers considered: Appellant’s Letter-brief received September 10, 2019

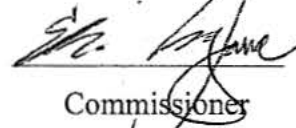
Appeals Unit Review: Statement of the Appeals Unit’s Findings and Recommendation

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 2/4/2020 

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Russo, Kelly

**DIN:** 18-G-1019

**Facility:** Bedford Hills CF

**AC No.:** 09-050-19 B

**Findings:** (Page 1 of 2)

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Appellant challenges the August 2019 determination of the Board, denying release and imposing a 12-month hold. The instant offense involved the appellant escaping from police custody while handcuffed and in a patrol car. Appellant exited the vehicle and fled before being found asleep in a field. Appellant raises the following issues: 1) the Board improperly considered her refusal to participate in vocational programming; and 2) the Board improperly considered her criminal history. 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 (4<sup>th</sup> 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 (1<sup>st</sup> 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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1<sup>st</sup> 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 (4<sup>th</sup> 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: Appellant’s instant offense of Escape in the second degree; Appellant’s criminal history including two prior state terms of incarceration, failures on

STATE OF NEW YORK – BOARD OF PAROLE

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community supervision, and a term of incarceration in another state; Appellant's history of drug addiction and alcohol use; Appellant's institutional efforts including good disciplinary record, completion of Phase I of Transitional Services, and refusal to participate in vocational programming; and release plans to live with a friend. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, and the sentencing minutes.

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 offense representing a continuation of Appellant's criminal history and Appellant's refusal to participate in vocational programming. See 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).

Appellant's claim that the Board improperly considered her refusal to participate in vocational programming is without merit. The Board may consider an inmate's need to complete programming in denying parole. See Matter of Allen, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018). Here Appellant concedes that she was placed into General Business for vocational programming, did not participate, requested that she be removed from the program due to lack of interest, and failed to complete the program, having "signed out" when told she would be placed on a waiting list for another program.

**Recommendation:** Affirm.