May 2021

Administrative Appeal Decision - White, Giovanni (2020-04-08)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: White, Giovanni **Facility:** Attica CF

NYSID: [redacted] **Appeal Control No.:** 08-074-19 B

DIN: 17-R-0594

Appearances: Norman P. Effman, Esq.
Wyoming County-Attica Legal Aid Bureau
18 Linwood Avenue
Warsaw, NY 14569

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

Board Member(s) who participated: Coppola, Crangle

Papers considered: Appellant's Brief received December 11, 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 4/8/2020. TH

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

Name: White, Giovanni **DIN:** 17-R-0594

Facility: Attica CF **AC No.:** 08-074-19 B

Findings: (Page 1 of 3)

Appellant challenges the July 2019 determination of the Board, denying release and imposing a 24-month hold. Appellant is currently serving a sentence of three to six years incarceration as a result of his conviction by plea to two counts of 3rd degree burglary. Appellant contends that the Board's determination failed to properly weigh his failure to program, as he argues this failure was attributable to his detention as a result of an incident which gave rise to criminal charges of which he was later acquitted as well as disciplinary proceedings which resulted in a Tier III infraction.

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 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 Board considered the infraction at issue, a Tier III disposition for violent conduct, creating a disturbance, assault on staff and interference. As appellant concedes, due to the lower level of proof required at an administrative disciplinary proceeding, his acquittal in the criminal proceeding

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: White, Giovanni **DIN:** 17-R-0594

Facility: Attica CF **AC No.:** 08-074-19 B

Findings: (Page 2 of 3)

---

is not dispositive. (see People ex rel. Matthews v. New York State Division of Parole, 58 N.Y.2d 196, 202-203 460 N.Y.S.2d 746 (1983)). Rather, appellant's argument is that the Board failed to consider this acquittal as relevant information mitigating his failure to program while he was detained as charges were pending.

Even assuming *arguendo* that appellant had established that his failure to program was caused in whole or in part by his detention on criminal charges (as opposed to his lawfully imposed sanction for the disciplinary infraction), the Board may consider an individual's need to complete rehabilitative programming even where a delay in commencement is through no fault of the individual. See Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

Moreover, the record reflects that the Board considered appellant's acquittal in the criminal proceeding and its relation to the infraction at issue, but indicated that the nature of the incident was relevant as part of a pattern of behavior rather than dispositive on its own:

> "Overall, I don't care about every single arrest, every single incident, every single justification or non-justification. I am talking in general about decades of criminal behavior."

(Tr, at 14).

In this regard, the Board properly considered appellant's pattern of criminal behavior, including the instant offense which involved burglarizing a mosque and stealing money from the donation box on two separate occasions—while appellant was on parole for a prior offense—as well as his lengthy history of larcenous behavior, among other things. The Board was particularly concerned about appellant's explanation for his criminal behavior, in which appellant denied substance abuse as a causal factor and instead seemed to treat his commission of the instant offense as justified retaliation for a perceived wrong inflicted by a member of the congregation from which he stole. The Board further considered appellant's release plans, noting its concerns about a lack of support if released, appellant's COMPAS instrument, and the sentencing minutes.

The Board considered the relevant statutory factors and, in light of appellant's commission of the instant offense two months after his release on parole (Matter of Guzman v. Dennison, 32 A.D.3d 798, 799, 821 N.Y.S.2d 208, 208 (1st Dept. 2006)), his extensive criminal history (Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013)), poor insight into the causes of his criminal behavior (see Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000)) and his incomplete rehabilitative programming (see Matter of Allen v. Stanford, 161 A.D.3d 1503,

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: White, Giovanni **DIN:** 17-R-0594

Facility: Attica CF **AC No.:** 08-074-19 B

Findings: (Page 3 of 3)

1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018)), the Board rationally concluded that there was not a reasonable likelihood that appellant would live and remain at liberty without violating the law, that release would be incompatible with the welfare of society and that release would so deprecate the seriousness of the offense so as to undermine respect for the law.

Thus, the Board's decision was rational and rendered according to lawful procedure and appellant's contentions are unavailing.

Recommendation: Affirm.