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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Perea, Jairo

Facility: Clinton CF

NYSID: [REDACTED]

Appeal Control No.: 07-066-19 B

DIN: 89-T-0248

Appearances: Diane Webster-Brady, Esq.
P.O. Box 2617
Plattsburgh, NY 12901

Decision appealed: June 2019 decision, denying discretionary release and imposing a hold of 18 months.


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

Papers considered: Appellant's Brief received November 7, 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 3/25/2020 .

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the June 2019 determination of the Board, denying release and imposing a 18-month hold. The instant offense involved Appellant causing the death of the female victim by shooting her once behind the left ear. Appellant raises the following issues: 1) the Board improperly considered erroneous information concerning Appellant’s criminal history in Florida and Arizona; 2) the provided interpreter was not able to sufficiently translate the proceedings for Appellant or the panel; 3) the Board did not provide direction as to what Appellant could do to improve his situation; and 4) the finding that Appellant’s release is incompatible with the welfare of the community is unsupported by any substantial evidence. 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 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.

STATE OF NEW YORK – BOARD OF PAROLE

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Murder in the second degree; Appellant's criminal history in New York, California, and Texas, and placement on probation community supervision; Appellant's institutional efforts including status as program satisfied, completion of ART, receipt of a GED, and a number of titles for license plates; and release plans to return to Colombia. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, an official statement from the District Attorney, and Appellant's parole packet.

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 and Appellant's criminal record representing a lack of judgment and disregard for the law, and concern that Appellant has in the past been deported and returned to the United States a number of times to commit additional crimes. See Matter of Robinson v. New York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); 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).

Appellant's contention that the Board improperly considered erroneous information concerning his criminal history in Florida and Arizona is without merit. Erroneous information, if not used in the decision as a basis for parole denial, will not lead to a reversal. Matter of Khatib v. New York State Bd. of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014); Matter of Perea v. Stanford, 149 A.D.3d 1392, 53 N.Y.S.3d 231 (3d Dept. 2017). A review of the interview transcript and the Board's written decision demonstrates that the disputed criminal history cited by Appellant played no role in the Board's determination. Matter of Tatta v. State, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163, 164 (3d Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Amen v. New York State Div. of Parole, 100 A.D.3d 1230, 1230, 954 N.Y.S.2d 276, 277 (3d Dept. 2012). The Board discussed the information in question during the interview (Tr. at 5-6.) and did not rely on that specific criminal behavior in its decision.

There is no merit to Appellant's claim that the provided interpreter was not able to sufficiently translate the proceedings for Appellant or the panel. Appellant never objected to the interpreter during the interview. Failure to object to an interpreter during the interview is deemed waived.

STATE OF NEW YORK – BOARD OF PAROLE

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People v Gordillo, 191 A.D.2d 455, 594 N.Y.S.2d 60, 61 (2nd Dept 1993), app. den. 81 N.Y.2d 1014, 600 N.Y.S.2d 202 (1993); People ex. rel. Haderxhanji v New York State Board of Parole, 97 A.D.2d 368, 467 N.Y.S.2d 381, 382 (1st Dept 1983).

As for Appellant’s complaint about lack of future guidance, the Board is not required to state what an inmate should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff’d, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

Finally, Appellant claims that there is no substantial evidence supporting the finding that his release is incompatible with the welfare of the community. Parole Board release decisions made in accordance with the law will not be disturbed unless irrational “bordering on impropriety.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (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).

Recommendation: Affirm.