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Administrative Appeal Decision - Rios, Ruben (2020-01-16)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Rios, Ruben

Facility: Greene CF

NYSID: [REDACTED]

Appeal Control No.: 05-117-19 B

DIN: 18-A-4638

Appearances: Scott A. Otis, Esq.
P.O. Box 344
Watertown, NY 13601

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

Board Member(s) who participated: **Berliner, Drake**

Papers considered: Appellant's Brief received August 22, 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.

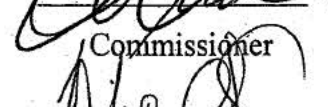
Final Determination: The undersigned determine that the decision appealed is hereby:

 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 1/16/2020.

LB

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the April 2019 determination of the Board, denying release and imposing a 12-month hold. The instant offense involved the appellant removing the victim's purse from under her coat and taking her wallet. Appellant raises the following issues: 1) the Board's determination was arbitrary and capricious because it failed to properly consider the required factors; 2) the decision was based exclusively on Appellant's instant offense and criminal history; 3) the Board failed to rebut the presumption in favor of release created by Appellant's receipt of an Earned Eligibility Credit; 4) Appellant was denied due process and failed to remain unbiased; 5) the Board relied on erroneous information in the COMPAS instrument; 6) Appellant was subject to unfair surprise in the timing of his hearing; 7) Appellant's conditional release ("C.R.") date was erroneously recalculated; and 8) the Board failed to procure the sentencing minutes. 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). In this case, the appellant received an EEC, therefore the deprecation standard does not apply here.

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,

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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.

An EEC does not automatically entitle an inmate to discretionary 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). Moreover, the Board is not required to give each factor equal weight. Matter of Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818; Matter of Pearl, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817. 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; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (2d Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Grand Larceny (Not Auto) in the fourth degree; Appellant's criminal history including six prior state terms of incarceration, multiple prior felony convictions, multiple prior misdemeanor convictions, and multiple prior revocations of parole; Appellant's history of drug abuse; his institutional efforts including clean disciplinary record, receipt of an EEC, and enrollment in [REDACTED] and school; and release plans to live with his wife and work at a laundromat. The Board also had before it and considered, among other things, Appellant's COMPAS instrument and the case plan.

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 lengthy criminal history. See Matter of Boccadisi v. Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); 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 Bello v. Bd. of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); People ex rel. Yates v. Walters, 111 A.D.2d 839, 839, 490 N.Y.S.2d 573, 575 (2d Dept. 1985); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1st Dept. 1983). The Board

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also cited the COMPAS instrument's medium risk for absconding and highly probable risk for substance abuse issues upon reentry. 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); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). The Board encouraged appellant to complete recommended programming and continue to work on his relapse prevention and community reentry plans. See 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); see also Matter of Connelly v. New York State Div. of Parole, 286 A.D.2d 792, 729 N.Y.S.2d 808, 809 (3d Dept.), appeal dismissed 97 N.Y.2d 677, 738 N.Y.S.2d 291 (2001); Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016). 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 claim that he was denied due process is without merit. An inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

The transcript as a whole does not support Appellant's contention that the parole interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006).

Appellant contends that the Board relied on erroneous information because the COMPAS instrument features a medium risk for absconding even though he has never absconded from parole. The Board does not determine COMPAS scores and an administrative appeal to the Board is not the proper forum to challenge the COMPAS instrument. Nonetheless, the presentence investigation report indicates that Appellant has a "Prior History of Absconding/Escape from Institution/Court" and a prior history of bench warrants. Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained

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therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 706, 708 (2000); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976).

As for the claim of unfair surprise in the timing of his hearing, the record reveals Appellant was given notice of his interview approximately one month in advance and completed his COMPAS assessment prior to his appearance before the Board. Appellant also failed to raise any issue regarding lack of preparation time at the interview. As Appellant failed to raise an objection to the complained of fact at the parole interview, this claim has not been preserved. Matter of Morrison v. Evans, 81 A.D.3d 1073, 916 N.Y.S.2d 655 (3d Dept. 2011); Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000).

Appellant's argument that his C.R. date was erroneously recalculated is without merit as the matter is beyond the scope of the Board's jurisdiction. 9 NYCRR § 8006.3; id. §§ 8006 *et seq.* The Board's determination with respect to discretionary release is also a distinct basis for release that has no impact on conditional release.

And while the Board did not possess the sentencing minutes despite a diligent effort to obtain them, the Appeals Unit has been able to obtain them since his appearance before the Board. A review of those minutes reveals the court made no recommendation with respect to parole. Accordingly, any error in failing to consider them is harmless and does not provide a basis for setting aside the appealed from decision. 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); Matter of Valerio v. New York State Div. of Parole, 59 A.D.3d 802, 872 N.Y.S.2d 606 (3d Dept. 2009).

Recommendation: Affirm.