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Administrative Appeal Decision - Mullins, Eugene (2017-06-21)

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Administrative Appeal Decision Notice

Inmate Name: Mullins, Eugene

Facility: Fishkill Correctional Facility

NYSID No.: [REDACTED]

Appeal Control #: 11-243-16B

Dept. DIN#: 85-A-0647

Appearances:

For the Board: The Appeals Unit

For Appellant: Orlee Goldfeld, Esq.
171 East Ridgewood Avenue, Suite 201
Ridgewood, New Jersey 07450



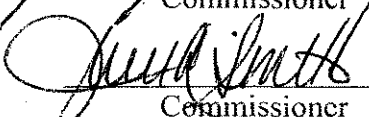
Board Member(s) who participated in appealed from decision: **Elovich, Cruse**

Decision appealed from: 11/2016 Denial of Discretionary Release with a 24-Month Hold.

Pleadings considered: Brief on behalf of the appellant received on March 30, 2017
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript, Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____
 Commissioner	<input checked="" type="checkbox"/> Affirmed	<input type="checkbox"/> Reversed for De Novo Interview	<input type="checkbox"/> Modified to _____

If the Final Determination is at variance with findings and recommendation of Appeals Unit, the written reasons for such determination shall be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and separate findings of the Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 6/21/17 (PH)

Distribution: Appeals Unit - Inmate - Inmate's Counsel - Inst. Parole File - Central File

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

Inmate Name: Mullins, Eugene

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NYSID No.: [REDACTED]

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Appellant challenges the November 2016 Board of Parole decision to deny release to parole primarily on the grounds that: (1) the Board failed to comply with the 2011 amendments to the Executive Law; (2) the Board's denial was arbitrary and capricious because the Board placed excessive weight upon the instant offense without adequate consideration of the COMPAS instrument and other positive factors and in the absence of actual aggravating factors; (3) the decision fails to provide adequate details and is unsupported; (4) the denial constitutes an unauthorized resentencing; (5) the case plan was inadequate; (6) the Board improperly and erroneously considered community opposition; (7) Appellant was not given the opportunity to review the complete COMPAS in advance of the interview; (8) the Board is wrongly penalizing Appellant for maintaining his innocence pursuant to an unwritten policy; and (9) the Board relied on erroneous information concerning the instant offense. These arguments are without merit.

As an initial matter, 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). 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) requires the Board of Parole ("Board") to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997); 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 2011, the law was amended to further require procedures incorporating risk and needs principles to assist the Board in making parole release decisions. Executive Law § 259-c(4). The Board utilizes the COMPAS instrument to satisfy this requirement. 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept.

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2014). The COMPAS instrument 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).

It is well settled that the weight to be accorded each of the requisite factors is within the discretion of the Board. See, e.g., Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815; Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881. The Board need not explicitly refer to each and every one of them in its decision, nor give them equal weight. Matter of Esquilin v. New York State Bd. of Parole, 144 A.D.3d 797, 40 N.Y.S.3d 279 (2d Dept. 2016); Matter of LeGeros, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). 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 McClain 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.

Here, insofar as Appellant suggests the Board failed to consider all requisite factors and material, there is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). Courts presume the Board follows its statutory commands and internal policies in fulfilling its obligations. Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000). The record as a whole further reflects the Board considered the appropriate factors including the instant offense, official statement, Appellant's institutional programming and efforts including completion of ART, ASAT and his GED, and release plans as well as the case plan, COMPAS instrument, and letters of support from counsel and Commissioner Dennison among others. Appellant also was given the opportunity to raise additional matters during the interview. That the Board did not explicitly mention Appellant's disciplinary record or a lack of prior criminal history does not constitute convincing evidence that the Board did not consider them. Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136, 138 (2d Dept. 1985). As for responsibility for the crime, the Board is obligated to rely upon an

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inmate's conviction and assume guilt in making its determination. Executive Law § 259-i; 9 N.Y.C.R.R. §§ 8001.3 and 8002.1, *et seq.*; Matter of Silmon v. Travis, 95 N.Y.2d 470, 476-77, 718 N.Y.S.2d 704, 707-708 (2000); Matter of Vigliotti v. State Executive Div. of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012). In so doing, the Board is permitted to consider an inmate's continued claim of innocence in denying parole. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of Romer v. Dennison, 24 A.D.3d 866, 868, 804 N.Y.S.2d 872, 874 (3d Dept. 2005). However, there is no merit to the allegation that the Board has an unwritten policy to deny parole to inmates if they do not admit guilt.

As for community opposition, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), in support *or* opposition of an inmate's release to parole supervision. See 9 N.Y.C.R.R. § 8000.5(c)(2) ("it is essential... to permit private citizens to express freely their opinions for or against an individual's parole"); Matter of Hamilton, 119 A.D.3d at 1273, 990 N.Y.S.2d at 719; Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852-53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004), *lv. denied* 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005); Matter of Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dept. 1982); Matter of Hamilton v. New York State Bd. of Parole., Index # 3699-2013, *Order and Judgment* dated October 25, 2013 (Devine J.S.C.)(Albany Co. Court), *aff'd* 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). The Board committed no error here.

As the Board's decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole, it satisfied the criteria set out in section 259-i of the Executive Law. Executive Law § 259-i(2)(a); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881. 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).

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Moreover, the reasons stated by the Board members for holding Appellant – evaluated in the context of the interview transcript – are sufficient grounds to support their decision under the second and third statutory standards. Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777, 778, 866 N.Y.S.2d 602 (2008); Matter of Jackson v. Evans, 118 A.D.3d 701, 702, 987 N.Y.S.2d 422, 423 (2d Dept. 2014). In addition to other factors considered, the Board permissibly cited the instant offense involving the murder of a woman with an ax and aggravating factors, namely, the brutality of the offense which involved the Appellant slashing the victim over 20 times in an explosive rage as well as that Appellant placed the victim's body in the field to evade responsibility. Executive Law § 259-i(2)(c)(A); Matter of Betancourt v. Stanford, --A.D.3d-- , 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Almeysda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Carrion v. New York State Bd. of Parole, 210 A.D.2d 403, 404, 620 N.Y.S.2d 420, 421 (2d Dept. 1994). While Appellant contends there is no support for the statement that he placed the body in the field to evade responsibility, it can reasonably be inferred from the record. The Board also permissibly cited that Appellant continues to deny responsibility and community opposition to release, as discussed above. The Board acted within its discretion in determining these considerations outweighed other positive factors and rendered discretionary release inappropriate at this time despite the COMPAS score. See generally People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

Appellant's additional contention that the Board failed to comply with the 2011 amendments to the Executive Law is likewise without merit. The Board regulations, which became effective July 30, 2014 and are consistent with 2011 memorandum issued by Board Chairwoman, sufficiently establish the requisite procedures for incorporating risk and needs principles into the process of making parole release decisions. Matter of Byas v. Fischer, 120 A.D.3d 1586, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 1414, 997 N.Y.S.2d 872, 874 (4th Dept. 2014). Proposed amendments to the Board's rules and regulations—lacking, as they do, any effect prior to the publication and filing of the Notice of Adoption—have no bearing on this appeal. A.P.A. Law § 203; Long Island Coll. Hosp. v. New York State Dep't of Health, 203 A.D.2d 292, 294, 609 N.Y.S.2d 920, 921–22 (2d Dept. 1994). Insofar as Appellant complains he was denied the opportunity to review a complete copy of the COMPAS instrument in advance of the interview, an inmate is not entitled to confidential portions. See, e.g., Matter of Justice v. Comm'r of New York State Dep't of Corr. & Cmty. Supervision, 130 A.D.3d 1342, 15 N.Y.S.3d 853 (3d Dept. 2015). Appellant also agreed with the

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assessment and there is nothing to indicate the Board relied on any erroneous information in the assessment as a basis for denial. 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 Restivo v. New York State Bd. of Parole, 70 A.D.3d 1096, 895 N.Y.S.2d 555 (3d Dept. 2010). As for the case plan, the inmate was given the opportunity to raise additional matters during the interview and failed to raise any alleged deficiency. If the inmate, who signed off on his case plan, was unsatisfied to the extent it did not address certain matters, the inmate should have addressed the issue with the counselor with whom he reviewed it. Matter of Frazier v. Stanford, Index No. 1381-16, *Decision & Order* dated Aug. 24, 2016 (Sup. Ct. Albany Co.) (Melkonian A.J.S.C.).

Appellant's assertion that the denial of parole release amounted to an improper resentencing also 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, 136 A.D.3d 1141, 25 N.Y.S.3d 698. And as the Board is required to consider the same statutory factors each time an inmate appears, it follows that the Board may deny release on the same grounds as relied upon in previous determinations. Matter of Hakim v. Travis, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3d Dept. 2003); *see also* Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.), *aff'd*, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008).

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was so irrational as to border on impropriety.

Recommendation:

It is the recommendation of the Appeals Unit that the Board's decision be affirmed.