

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Parole Administrative Appeal Decisions

Parole Administrative Appeal Documents

May 2022

Administrative Appeal Decision - Smith, Jihad (2019-05-10)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/aad>

Recommended Citation

"Administrative Appeal Decision - Smith, Jihad (2019-05-10)" (2022). Parole Information Project
<https://ir.lawnet.fordham.edu/aad/741>

This Parole Document is brought to you for free and open access by the Parole Administrative Appeal Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Parole Administrative Appeal Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Smith, Jihad

Facility: Five Points CF

NYSID: [REDACTED]

Appeal Control No.: 01-088-19 B

DIN: 17-D-0079

Appearances: Jihad Smith 17D0079
Five Points Correctional Facility
Caller Box 400
State Route 96
Romulus, New York 14541

Decision appealed: December 2018 decision, denying discretionary release and imposing a hold of 15 months.

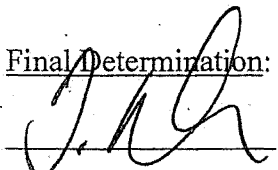
Board Member(s) who participated: Demosthenes, Agostini

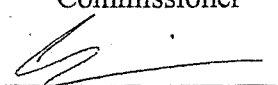
Papers considered: Appellant's Letter-brief received March 5, 2019

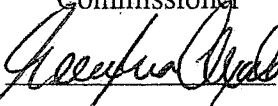
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 5/10/19 GG.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Smith, Jihad

DIN: 17-D-0079

Facility: Five Points CF

AC No.: 01-088-19 B

Findings: (Page 1 of 3)

Appellant challenges the December 2018 determination of the Board, denying release and imposing a 15-month hold. Appellant is incarcerated for two separate instant offenses. In one he and co-defendants tied one victim and hit another with the butt end of a gun, while stealing their personal property. In the second, he and co-defendants assaulted a staff member at a facility he was attending. Appellant is also a member of the Bloods gang. Appellant's appeal raises the following issues: 1) the Board failed to consider and/or properly weigh the required statutory factors, as he is now rehabilitated and ready for release. 2) the decision is based upon erroneous information in that he never possessed a gun, and, the victim in the assault was another inmate, and not a staff member of the facility.

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). Whereas here the inmate has received an EEC, 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 (1st 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). 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).

Although the Board placed emphasis on the crime, the record reflects it also considered other appropriate factors and it was not required to place equal weight on each factor considered. Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018); Matter of Arena v. New York State Dep't of Corr. & Cmty. Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017).

The fact that the Board afforded greater weight to the inmate's criminal history, as opposed to other positive factors, does not render the denial of parole for that reason irrational or improper. 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).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Smith, Jihad

DIN: 17-D-0079

Facility: Five Points CF

AC No.: 01-088-19 B

Findings: (Page 2 of 3)

The Board may consider negative aspects of the COMPAS instrument. Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

The Board may consider an inmate's need to complete rehabilitative programming in denying parole. 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).

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.

As for the alleged erroneous information, the Board decision clearly states all crimes were committed while acting in concert. And the specific information disputed by appellant is all found right in the Pre-sentence Investigation Report. Pursuant to Executive Law §259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976); Lee v U.S. Parole Commission, 614 F.Supp. 634, 639 (S.D.N.Y. 1985); Carter v Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). To the extent the appellant complains about the information contained within the pre-sentence report, the Board is mandated to consider it, is not empowered to correct information therein, and is entitled to rely on the information contained in the report. See, Executive Law §259-(a)-1; Executive Law §259-(1)(a); (2)(c)(A); May v New York State Division of Parole, 273 A.D.2d 667, 711 N.Y.S.2d 349 (3d Dept. 2000); Richburg v New York State Board of Parole, 284 A.D.2d 685, 726 N.Y.S.2d 299 (3d Dept. 2001); Payton v Thomas, 486 F.Supp. 64, 68 (S.D.N.Y. 1980); Baker v McCall, 543 F.Supp. 498, 501 (S.D.N.Y. 1981), affirmed 697 F.2d 287 (2d Cir. 1982); Williams v Travis, 11 A.D.3d 788, 783 N.Y.S.2d 413 (3d Dept. 2004); Sutherland v Alexander, 64 A.D.3d 1028, 881 N.Y.S.2d 915 (3d Dept. 2009); Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014). The inmate is not permitted to collaterally attack the presentence report. Cox

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Smith, Jihad

DIN: 17-D-0079

Facility: Five Points CF

AC No.: 01-088-19 B

Findings: (Page 3 of 3)

v New York State Division of Parole, 11 A.D.3d 766, 768 (3d Dept. 2004); Simmons v Travis, 15 A.D.3d 896, 788 N.Y.S.2d 752 (4th Dept. 2005). The inmate can't challenge the accuracy of information in the Pre-sentence Investigation Report, as that challenge should have been made to the original sentencing court. Manley v New York State Board of Parole, 21 A.D.3d 1209 (3d Dept. 2005) lv. den. 6 N.Y.3d 702 (2005); Champion v Dennison, 40 A.D.3d 1181, 834 N.Y.S.2d 585 (3d Dept. 2007). lv.dism. 9 N.Y.3d 913, 844 N.Y.S.2d 167. Carter v Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); Vigliotti v State of New York, Executive Division of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012); Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Del Rosario v Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016).

Recommendation: Affirm.