May 2022

Administrative Appeal Decision - Hogan, John (2019-05-10)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Hogan, John **Facility:** Collins CF

NYSID: [redacted] **Appeal Control No.:** 01-012-19 B

DIN: 97-B-0797

Appearances: John Hogan, 97-B-0797
Collins CF
Middle Road
P.O. Box 490
Collins, New York 14034-0490

Decision appealed: December 2018 decision denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Alexander, Crangle**

Papers considered: Appellant's Brief received March 12, 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:

_____ Commissioner — ___ **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** _____

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.

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

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Appellant was sentenced to an aggregate indeterminate term of 22 years, six months to 45 years upon his conviction of multiple sex offenses, including Rape in the first degree and Sodomy in the first degree (four counts). In the instant appeal, Appellant challenges the December 2018 determination of the Board denying release and imposing a 24-month hold following his initial appearance as excessive, contrary to the sentencing court's comments and contrary to the interests of justice. He seeks a reduction in the length of his hold. This claim is 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 King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (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 Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant sex offenses involving Appellant's 11 year old in-law that were committed over a long period of time; Appellant's criminal history including a prior sex offense; his institutional record including program completions such as the sex offender program, [redacted] and ART and overall discipline that includes multiple infractions; and his release plans to reside with his mother and seek employment. The Board also had before it and considered,

among other things, the sentencing minutes, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet and letters of support.

After considering all required factors and principles, 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 offenses, that they are a continuation of Appellant's criminal record, his discipline and his responses during the interview. See Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017); Matter of Singh v. Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept.), lv. denied, 24 N.Y.3d 906, 995 N.Y.S.2d 715 (2014); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); Matter of Shapard v. Zon, 30 A.D.3d 1098, 1099, 815 N.Y.S.2d 852, 853 (4th Dept. 2006). The Board acknowledged Appellant's COMPAS instrument indicates lower risk and needs scores but departed from the assessment based on Appellant's overall disciplinary record and his interview responses which led the Board to believe his rehabilitation is not complete. Executive Law §§ 259-c(4), 259-i; 9 N.Y.C.R.R. § 8002.2(a).

The record reflects the Board discussed with Appellant and considered the sentencing court's recommendation that "unless he has participated in a sex offender treatment program and unless he has shown positive signs of rehabilitation, that they should forgo any early paroling, work release or any other type of early let-out of our prison system until this defendant has proven his ability to be a functioning member of this society; not predator of people, young children, or other members of our society." (Mins. at 32-33.) A court's recommendation is but one factor for the Board to consider as the Board is vested with discretion to determine whether release is appropriate following its consideration of the full record and interview. Executive Law § 259-i(2)(c)(A)(vii). That is exactly what happened here.

As for Appellant's claim of innocence, the Board is obligated to rely upon his conviction and assume his 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). Furthermore, "there is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight." Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704. Thus, it is well established that the Board may take into consideration an inmate's continued claim of innocence. See, e.g., Matter of Silmon, 95 N.Y.2d 470, 718 N.Y.S.2d 704; Matter of Webb v. Travis, 26 A.D.3d 614, 810 N.Y.S.2d 233 (3d Dept. 2006); Matter of Romer v. Dennison, 24 A.D.3d 866, 868, 804 N.Y.S.2d 872, 874 (3d Dept. 2005); Matter of Okafor v. Russi, 222 A.D.2d 920, 635 N.Y.S.2d 340 (3d Dept. 1995).

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Finally, the Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that the 24-month hold is excessive or improper.

Recommendation: Affirm.