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Administrative Appeal Decision - Vanalstine, David (2019-02-06)

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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: VanAlstine, David

Facility: Elmira CF

NYSID: [REDACTED]

Appeal Control No.: 03-166-18 B

DIN: 14-A-3528

Appearances: A. Renee Sutton, Esq.
P.O. Box 774
Elmira, New York 14904

Decision appealed: March 2018 decision, denying discretionary release and imposing a hold of 12-months.

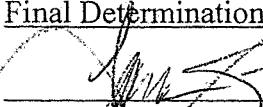
Board Member(s) who participated: Cruse, Drake.

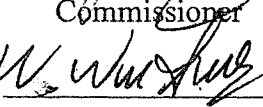
Papers considered: Appellant's Brief received November 6, 2018

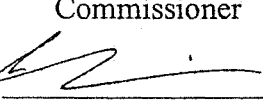
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 2/6/19 66.

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the March 2018 determination of the Board, denying release and imposing a 12-month hold.

Appellant raises the following issues in his brief: (1) the Board placed too much “focus” on Appellant’s disciplinary record; (2) Appellant should be released to community supervision because he was awarded an Earned Eligibility Certificate (EEC); and (3) the Board did not provide sufficient weight to Appellant’s “good insight and remorse over his past criminal history” and his “renouncing gang involvement”.

As to the first issue, 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). “Although these standards are no longer repeated in the [Board’s] regulation, this in no way modifies the statutory mandate requiring their application.” Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1273-74, 990 N.Y.S.2d 714, 719 (3d Dept. 2014); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

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).

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

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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.

The Board may place greater weight on an inmate's disciplinary record even in instances where the infractions occurred earlier in the inmate's incarceration. Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); Matter of Warmus v. New York State Dep't of Corrs. & Cmty. Supervision, Index No. 7516-17, *Decision, Order & Judgment* dated Sept. 10, 2018 (Sup. Ct. Albany Co.) (O'Connor, A.S.C.J.). The Board may also consider just a single disciplinary infraction. See Matter of Maricevic v. Evans, 86 A.D.3d 879, 927 N.Y.S.2d 471 (3d Dept. 2011). In Appellant's case, he received a Tier 2 disciplinary ticket just days before his interview with the Board, and a Tier 3 ticket just two months prior to the Board interview. Appellant's disciplinary record also includes many other disciplinary tickets.

As to the second issue, Appellant's receipt of an Earned Eligibility Certificate (EEC) does not automatically guarantee his release, and it does not eliminate consideration of the statutory factors including the instant offense. Matter of Milling v. Berbary, 31 A.D.3d 1202, 1203, 819 N.Y.S.2d 373, 374 (4th Dept.), *lv. denied*, 7 N.Y.3d 808, 809, 822 N.Y.S.2d 481 (2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006); Matter of Barad v. New York State Bd. of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), *lv. denied*, 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001). 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).

As to the third issue, it is neither arbitrary nor capricious for the Board to consider Appellant's remorse and insight relative to his crime of conviction. Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000); Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018) (minimization of crimes); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018) (limited expression of remorse); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (lack of insight and failure to accept responsibility), *lv. denied*, 29 N.Y.3d 901 (2017); Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121 (1st Dept. 2007) (limited insight and remorse); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736

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N.Y.S.2d 275 (2d Dept. 2002) (limited insight into why crime committed). Insight and remorse are relevant not only to rehabilitative progress but also to whether release would deprecate the severity of the offense. Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121, 125 (1st Dept. 2007). Inasmuch as Appellant disputes the Board's finding with respect to insight and remorse, it was well within the Board's authority to make an assessment of Appellant's credibility (Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008)). Also, the Board is permitted to conclude that the serious nature of the inmate's offense, as well as limited insight and/or remorse, outweigh other factors. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000), aff'g 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); 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 Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Serrano v. N.Y. State Exec. Dep't-Div. of Parole, 261 A.D.2d 163, 164, 689 N.Y.S.2d 504, 505 (1st Dept. 1999).

Recommendation: Affirm.