May 2022

Administrative Appeal Decision - Pelton, Gregory (2019-01-11)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Pelton, Gregory **Facility:** Ulster CF

NYSID: [redacted] **Appeal Control No.:** 09-165-18 SC

DIN: 99-A-6108

Appearances: Marshall Nadan, Esq.
P.O. Box 4091
Kingston, New York 12402

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

Board Member(s) who participated: Coppola, Davis.

Papers considered: Appellant's Brief received October 30, 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 hearing** ___ **Modified to** _____
Commissioner

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo hearing** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Vacated, remanded for de novo hearing** ___ **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 1/10/19 GG.

Distribution: Appeals Unit - Appellant - Appellant's Counsel - Inst. Parole File - Central File
(0368) (11/2018)

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the September 12, 2018 determination of the Board, denying release and imposing a 24-month hold.

Appellant raises the following issues in the brief submitted in support of the administrative appeal: (1) the Board's decision to deny Appellant's immediate release back into the community was arbitrary, capricious and irrational, and was made in violation of applicable legal authority; (2) the Board did not provide sufficient weight to Appellant's institutional accomplishments, educational achievements, vocational training, letters of support, certain low scores contained in his COMPAS instrument, and release plans when making its determination; (3) the Board's decision lacked sufficient detail; (4) the Board did not consider Appellant's youth at the time of commission of the instant offense; (5) the Board's decision was made in violation of Appellant's equal protection and due process rights under the Constitution, and the 24-month hold constituted cruel and unusual punishment; (6) the Board's decision was tantamount to a resentencing of Appellant; and (7) the Board is prohibited from imposing a hold which exceeds in length any prior hold imposed by a different panel of Commissioners following a prior interview.

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 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, 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 to the second issue, the record demonstrates the Board considered the relevant factors, including his good behavior, accomplishments in prison, many letters of support, employability, involvement in institutional programs, and plans upon release. While these factors weighed in his favor, the Board did not act "arbitrarily or capriciously when it denied parole application on the ground that his positive post-conviction activities, however commendable, remained overshadowed by the extraordinary severity of his crime." Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759, 760 (1st Dept. 2002).

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 satisfies this requirement in part by using the COMPAS instrument. 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. 2014). Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Even uniformly low COMPAS scores and other evidence of rehabilitation would not resolve the broader questions of society's welfare, public perceptions of the seriousness of a crime, or whether release would undermine respect for the law. Thus, the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. 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); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017).

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As to the third issue, the Board's decision satisfied the criteria set out in Executive Law §259-i(2)(a) and 9 N.Y.C.R.R. §8002.3(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. 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); 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 v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). The Board need not explicitly mention each factor considered. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). While the Board's amended regulation reinforces that detailed reasons must be given for a denial of release, it did not alter this well-established principle. 9 N.Y.C.R.R. § 8002.3(b). Courts regularly sustain parole decisions with less particularized explanations than presented here. Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008), aff'g 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.) (citing decision); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013), rev'g 2013 N.Y. Slip Op 30265(U), 2013 N.Y. Misc. Lexis 552 (Sup. Ct. New York Co. Feb. 5, 2013) (citing decision).

As to the fourth issue, in Hawkins, the Third Department held that "[f]or those persons convicted of crimes committed as juveniles [i.e., 17 and under] who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 39, 30 N.Y.S.3d 397, 400 (3d Dept. 2016), aff'g in part 51 Misc. 3d 1218(A) (Sup. Ct. Sullivan Co. 2015). After Hawkins, the Board revised its regulations governing parole determinations for minor offenders to require that the Board "consider . . . the diminished culpability of youth," and "growth and maturity" since the time of the offense. 9 N.Y.C.R.R. § 8002.2(c).

The decision explicitly acknowledges Appellant's youth at the time of the offense and the interview transcript clearly demonstrates the Board took into consideration his youth, attendant circumstances, and subsequent growth as required. 9 N.Y.C.R.R. § 8002.2(c); Matter of Allen v. Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 30 N.Y.S.3d 397, 400 (3d Dept. 2016). For example, the Board discussed the reason for commission of the crime, and who Appellant was "hanging out with" at that time (See, Tr. at 4), his employment and problems with employment at that time, as well as his living arrangements at that time (See, Tr. at 5). The circumstances of the crime and Appellant's mindset at that time were also discussed (See, Tr. at

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4-10). Appellant also discussed [redacted] his work with the Preparedness Project (See, Tr. at 11), his family life (See, Tr. at 11-12), [redacted] release plans (including familial relationships) and vocational skills (See, Tr. at 12-13,15,16), institutional programming (See, Tr. at 15), and his issues with drugs and alcohol (See, Tr. at 4, 5, 17, 20, 21).

As to the constitutional challenges raised in the fifth issue of Appellant's brief, 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).

Inasmuch as Appellant argues he did not receive the same fair consideration as other similarly situated inmates, the decision has a rational relationship to the objectives of community safety and respect for the law. Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005). There is no merit to his equal protection claim. Matter of Williams v. New York State Div. of Parole, 70 A.D.3d 1106, 894 N.Y.S.2d 224 (3d Dept.), lv. denied, 14 N.Y.3d 709, 901 N.Y.S.2d 143 (2010); Matter of Tatta v. Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept.), lv. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); Matter of DeFino v. Travis, 18 A.D.3d 1079, 795 N.Y.S.2d 477 (3d Dept. 2005).

As for the Eighth Amendment, the denial of parole under a statute invoking discretion in parole determinations does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Carnes v. Engler, 76 Fed. Appx. 79 (6th Cir. 2003); Lustgarden v. Gunter, 966 F.2d 552, 555 (10th Cir.), cert den. 506 U.S. 1008, 113 S. Ct. 624 (1992), rehearing denied 507 U.S. 955, 113 S. Ct. 1374 (1993); Pacheco v. Pataki, No. 9:07–CV–0850, 2010 WL 3909354, at *3 (N.D.N.Y. Sept. 30, 2010). Appellant's maximum sentence is life imprisonment. The Board acted within its discretion to hold Appellant for another 24 months, after which he will have the opportunity to reappear before the Board.

As to the sixth issue, Appellant's assertion that the denial of parole release amounted to an improper resentencing 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

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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 v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

As to the seventh issue, 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 states that the 24-month hold should have been limited to a lesser period of time because a previous panel of Commissioners imposed a shorter hold following an interview previously conducted. There is no legal authority to support this claim. Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

Recommendation:

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