May 2022

Administrative Appeal Decision - Watson, Gregory (2018-12-28)

STATE OF NEW YORK : BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: WATSON, GREGORY **Facility**: Woodbourne Correctional Facility

NYSID No.: [redacted] **Appeal Control #**: 04-135-18 B

Dept. DIN#: 95A7222
Appearances:
For the Board, the Appeals Unit
For Appellant:

Glenn Kroll, Esq.
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P.O. Box 10
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Board Member(s) who participated in appealed from decision: Alexander, Demosthenes, Shapiro.

Decision appealed from: 3/2018 Denial of Discretionary Release; 24-month hold.

Pleadings considered:
Brief on behalf of the Appellant submitted on: October 15, 2018.
Statement of the Appeals Unit's Findings and Recommendation.

Documents 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 have determined that the decision from which this appeal was taken be and the same is hereby

_____ ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ___ **Affirmed** ___ **Reversed 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 12/28/18 (AH).

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant raises various issues in the brief submitted in support of the administrative appeal he initiated following the Board of Parole's decision to deny his immediate release to community supervision following an interview held on or about March 13, 2018. The brief was signed and submitted by his attorney. The Appeals Unit has reviewed each of the issues raised by Appellant and finds that the issues have no merit.

The issues raised by Appellant are as follows: (1) the Board's decision was arbitrary and capricious; (2) the 24-month hold imposed by the Board until Appellant's next interview was excessive; (3) the Board's decision was made in violation of Appellant's rights to due process under the U.S. Constitution; (4) the Board's decision was not supported by a preponderance of the evidence pursuant to 9 N.Y.C.R.R. §8006.3(b); (5) the Board's decision was not made in accordance with the sentencing guidelines provided under Executive Law §259-c(1); (6) the Board's decision lacked sufficient detail; (7) the Board's determination that Appellant failed to respond to inquiries regarding his violent actions was not accurate; (8) the Board did not provide sufficient weight to certain "Low" scores contained in Appellant's COMPAS instrument; and (9) the Board failed to provide Appellant with guidance as to how to improve his chances of parole release.

As to the first issue raised by Appellant in his brief, the legal standard governing the decision-making process of the Board when assessing the suitability of an inmate's possible release to community supervision is: (1) whether or not there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law; (2) whether or not the inmate's release is incompatible with the welfare of society; and (3) whether or not the inmate's release will so deprecate the seriousness of the crime as to undermine respect for law. See Executive Law §§259-c(4), 259-i(2)(c)(A); Robles v. Dennison, 745 F. Supp. 2d 244 (W.D.N.Y. 2010); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). In the instant case, the Board considered each of these three factors and specifically relied upon factors (2) and (3) in making its determination to deny Appellant's release to community supervision and further found that it was not convinced that Appellant would live and remain at liberty without violating the law.

"Clearly, the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a [inmate] who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, **bears a heavy burden**." Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dep't 1997) (emphasis added). See also Matter of Phillips v. Dennison, 41 A.D.3d 17 (1st Dept. 2007).

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Unless Appellant is able to demonstrate convincing evidence to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements, and judicial intervention is warranted only when there is a showing of irrationality to the extent that it borders on impropriety. Matter of Jackson v. Evans, 118 A.D.3d 701 (2d Dept. 2014); Matter of Williams v. New York State Div. of Parole, 114 A.D.3d 992 (3rd Dept. 2014); Matter of Thomches v. Evans, 108 A.D.3d 724 (2d Dept. 2013).

In determining whether to grant parole to an inmate, the Board is required to consider a number of statutory factors (see Executive Law §§259-c(4); 259-i(2)(c)(A); 9 NYCRR §8002.2). In addition, the Board's decision must detail the reasons for a denial of discretionary release (see Executive Law §259–i(2)(a)(i)). However, the Board is not required to give each factor it considered equal weight (Matter of Arena v. New York State Dept. of Corr. & Community Supervision, 156 A.D.3d 1101 (3d Dept. 2017); Matter of Hill v. New York State Bd. of Parole, 130 A.D.3d 1130 (3d Dept. 2015); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Vigliotti v. State of N.Y. Exec. Div. of Parole, 98 A.D.3d 789 (3d Dept. 2012); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948 (2d Dept. 2012); Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690 (2d Dept. 2010)), and its actual or perceived emphasis on a specific factor is not improper as long as the Board complied with statutory requirements. Romer v. Dennison, 24 A.D.3d 866 (3d Dept. 2005); Matter of Collado v. New York State Division of Parole, 287 A.D.2d 921 (3d Dept. 2001); Matter of Rivera v. Executive Department, Board of Parole, 268 A.D.2d 928 (3d Dept. 2000).

The Board is entitled to afford more weight to the nature and seriousness of the underlying crime(s) and the inmate's criminal history than other factors. See Matter of Perez v. Evans, 76 A.D.3d 1130 (3d Dept. 2010). In this regard, the denial of release to community supervision primarily because of the gravity of the inmate's crime is appropriate. Karlin v. Alexander, 57 A.D.3d 1156 (3d Dept. 2008); Matter of Alamo v. New York State Div. of Parole, 52 A.D.3d 1163 (3d Dept. 2008); Matter of Flood v. Travis, 17 A.D.3d 757 (3d Dept. 2005).

The Court of Appeals unanimously affirmed the First Department decision in Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dept. 2008), aff'd, 11 N.Y.3d 777 (2008), in which the Appellate Court held: (1) it is not improper for the Board to primarily base its decision to deny parole release on the seriousness of the offense(s); (2) the weight to be assigned to each factor considered by the Board in making its determination is to be made solely by the Board; (3) parole release should not granted merely as a reward for good conduct or efficient performance of duties while confined; and (4) the Board can consider the credibility of statements made by the inmate in regard to whether full responsibility was taken for the criminal behavior.

So long as the decision denying release to community supervision is made in accordance with statutory requirements, it is not to be set aside when subject to administrative or judicial review, particularly given the narrow scope of judicial review of discretionary parole denial determinations. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013).

An inmate is not automatically entitled to release to community supervision merely because of achievements within a prison's institutional setting, no matter how numerous. Pearl v. New York State Div. of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Corley v. New York State Div. of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Rivera v. Travis, 289 A.D.2d 829 (3d Dept. 2001). In addition, per Executive Law §259-i(2)(c)(A), an application for release to community supervision shall not be granted merely as a reward for Appellant's good conduct or achievements while incarcerated. Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001). Therefore, a determination that the inmate's exemplary achievements are outweighed by the severity of the crimes is within the Board's discretion. Matter of Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1st Dept. 2005); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004).

Appellant has the burden of showing that the Board's determination was irrational, bordering on impropriety, and therefore arbitrary and capricious, before administrative or judicial intervention is warranted. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Singh v. Dennison, 107 A.D. 3d 1274 (3d Dept. 2013). It is not the function of the Appeals Unit to assess whether the Board gave proper weight to the relevant factors, but only whether the Board followed applicable legal authority when rendering its decision, and that is supported, and not contradicted, by the facts in the record. Matter of Comfort v. New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009); see Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268. The weight to be accorded each of the requisite factors remains solely a matter of the Parole Board's discretion. See Matter of Dolan v. New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Matter of Singh v. Evans, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Montane v. Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903, appeal dismissed, 24 N.Y.3d 1052 (2014). Appellant has not demonstrated any abuse on the part of the Board in its decision-making process that would warrant a *de novo* release interview.

As to the second issue raised by Appellant, in instances where release to community supervision is denied, the Board shall establish a date for reconsideration which shall not exceed 24

months from the date of the interview. See Executive Law §259-i(2)(a); 9 NYCRR §8002.3(b); Matter of Abascal v. New York State Board of Parole, 23 A.D.3d 740 (3d Dept. 2005); Matter of Tatta v. State, 290 A.D.2d 907 (3d Dept. 2002). Therefore, the 24-month hold was proper.

As to the third issue raised by Appellant, he claims that a constitutionally protected due process right was violated by the Board in making its determination. Initially, we note that the Supreme Court has held that because a person's liberty interest is extinguished upon conviction, there is no inherent right, or right under the U.S. Constitution, to parole. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Hewitt v. Helms, 459 U.S. 460 (1983). Likewise, there is no due process right to parole under the New York State Constitution. Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979); Matter of Russo, 50 N.Y.2d 69; Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005). Thus, the protections of the due process clause do not apply to the Parole Board's determinations as to whether an inmate should be released to parole supervision. Maldonado v. Evans, 2014 U.S. Dist. LEXIS 183163 (W.D.N.Y. 2014); Barrow v. Vanburen, 2014 U.S. Dist. LEXIS 181466 (N.D.N.Y. 2014); Barna v. Travis, 239 F.3d 169 (2d Cir. 2001). We recognize, however, that while an inmate has no vested right to parole release under the due process clause, there is a liberty interest which requires, as a matter of *procedural* due process, an opportunity to be heard, and a statement of the reasons for the denial of release. Therefore, in deciding whether to grant or deny parole, all the Board must do is: (1) afford the inmate an opportunity to be heard, and (2) if parole is denied, provide the reasons for the denial. Thurman v. Allard, 2004 U.S. Dist. LEXIS 18904 (S.D.N.Y. 2004); Blackett v. Thomas, 293 F.Supp.2d 317 (S.D.N.Y. 2003); Gittens v. Thomas, 2003 U.S. Dist. LEXIS 9087 (S.D.N.Y. 2003). Appellant received both of these constitutional protections and, therefore, any arguments alleging that the Board's decision was made in violation of the due process clause, and in contravention of a liberty interest arising from the due process clause, are without merit.

As to the fourth issue raised by Appellant – that the Board's decision was not supported by a preponderance of the evidence pursuant to 9 N.Y.C.R.R. §8006.3(b) – this argument represents the first in a series of errors made by Appellant's attorney in citing incorrect provisions of law in support of his arguments. The interview being challenged by Appellant was a reappearance interview scheduled before the Board of Parole. The provisions of 9 N.Y.C.R.R. §8006.3(b) apply only to parole rescission or final revocation determinations, not reappearance interviews. The reference to this particular regulatory provision is, therefore, not accurate.

As to the fifth issue raised in the brief – that the Board's decision was not made in accordance with the "sentencing guidelines" provided under "Executive Law §259-C(1)" – once again Appellant's attorney makes an incorrect reference, this time involving a statutory reference. Initially we note that subdivision (1) of Section 259-c of the Executive Law no longer exists (this section begins with subdivision (2)). Also, the guidelines he refers to were removed by Chapter 62 of the Laws of 2011 (seven years ago).

The Appeals Unit respectfully suggests that Appellant and his attorney carefully note changes to both State regulations and statutes governing parole release decisions that have been made over the past several years in submitting any future briefs in support of an administrative appeal.

The sixth issue raised states that the Board's decision lacks sufficient detail. When read against settled case law and the interview transcript, it cannot be said that the reasons provided by the Board in its decision denying Appellant's release to community supervision were improper or proscribed under §259-i(2)(c)(A) of the Executive Law. The reasons provided for denying Appellant's release to community supervision were properly detailed as required by the Executive Law and not stated in conclusory terms, and further, were supported by the record. The Board's decision denying Appellant's release to community supervision is rational and should be sustained. Corley v. New York State Division of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Matter of Dorman v. New York State Board of Parole, 30 A.D.3d 880 (3d Dept. 2006); Matter of Pearl v. New York State Division of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Matter of Cornejo v. New York State Division of Parole, 269 A.D.2d 713 (3d Dept. 2000).

Since the Board's decision was sufficiently detailed to apprise Appellant of the reasons for the denial of parole release, no further detail was necessary. Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677 (3d Dept. 1993). Furthermore, there are no statutory, regulatory or due process requirements that the internal deliberations or discussions of the Board following its interview with a parole eligible inmate appear on the record. Matter of Collins v. Hammock, 96 A.D.2d 733(4th Dept. 1983); Matter of Dow v. Hammock, 118 Misc.2d 462 (Sup. Ct., Wyoming Co., March 31, 1983).

As to the seventh issue raised in Appellant's brief, a review of the transcript reveals two recurring, and divergent, responses made by Appellant when asked about the circumstances of the crime of conviction. On the one hand, Appellant offers a multitude of excuses for his commission of the crime, while on the other hand he states that he is sorry for having the committed the crime. However, the Board, in its decision, is correct in stating that Appellant avoids discussion of the violent facts surrounding the brutal nature of the crime. This is not a minor point, as the pre-sentence

investigation report notes that the instant offense represents Appellant's third violent felony offense. Moreover, the trial court judge at sentencing made these remarks concerning Appellant and his crime of conviction: "…the terrible display of devastation and pain that was visited upon the family of [the victim]…"; that Appellant's "vicious goal" was to rob the victim "of the remaining years of her life"; that the victim's violent death was Appellant's "terrible aim and that was his inhuman accomplishment"; further, that "He [inmate/Appellant Watson] did not care about [the victim]. He does not care about you." (referring to the victim's family).

As to the eighth issue, in determining an inmate's suitability for possible release to community supervision, the Board must consider the institutional record of the inmate. See §259-i(2)(c)(A)(i); 9 N.Y.C.R.R. §8002.2(d)(1). One of the institutional records the Board must consider in making its determination as to the suitability of an inmate's possible release to community supervision is a risk and needs assessment designed to measure the inmate's rehabilitation. See Executive Law §259-c(4). In strict compliance with statutory and regulatory requirements, the Department of Corrections and Community Supervision promulgated Directive 8500 which provides comprehensive operating procedures governing the Correctional Offender Management Profiling for Alternative Sanctions instrument, commonly referred to as the COMPAS instrument, a research based clinical assessment instrument used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other interventions. "By adopting the COMPAS risk assessment and utilizing it in considering an inmate's release, the Board has effectively complied with the minimal requirements of the amendments to the Executive Law." Matter of Steven Diaz v. New York State Bd. of Parole, 42 Misc. 3d 532 (Sup. Ct.; Cayuga Co. 2013).

The information contained in the COMPAS instrument is used to assist the Board of Parole in making its decision, but the quantified results contained in the COMPAS instrument are not alone determinative factors in the decision-making process. See Executive Law §§259-c(4), 259-i(2)(c)(A); Matter of Leung v. Evans, 120 A.D.3d (3d Dept. 2014), lv. denied 24 N.Y.3d 914 (2015); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107 (3d Dept. 2014); accord, Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014). Moreover, uniformly low COMPAS scores and other evidence of an inmate's rehabilitation do not undermine the broader questions of public safety, public perceptions of the seriousness of a crime, and whether an inmate's release to parole would undermine respect for the law. Thus, the COMPAS instrument cannot mandate a particular result, and the Board determines the weight to be ascribed to the information contained therein. Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016).

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The COMPAS instrument is used to develop the inmate's Offender Case Plan (formerly called the "Transitional Accountability Plan" or "TAP"), which is created for, and in cooperation with, an inmate by an Offender Rehabilitation Coordinator (ORC). The Case Plan serves to prioritize the inmate's needs and establish goals to address these needs, and further provides tasks designed to achieve these goals. Case Plans are reviewed with the inmate quarterly unless the inmate is more than four years from the earliest release date in which instance it is reviewed less `frequently. A Case Plan was prepared for Appellant and made available to the Board at the time of the interview.

Appellant limits his remarks with respect to the COMPAS instrument to certain "Low" scores contained therein. However, he did receive a "High" COMPAS score for History of Violence. He also received a "High" score for Prison Misconduct. He additionally scored as "Probable" for Re-Entry Substance Abuse. Also, there are several more pages of narrative and scales contained in the COMPAS instrument that the Board also reviewed and considered in making its decision to deny parole release. The Board in deviating from the low COMPAS scores looked at all of these factors as well as all of the other records before it at the time of the interview, and of course considered what was discussed during the interview.

As to the night issue raised by Appellant in his brief submitted in support of the administrative appeal, an inmate has no due process right to a statement from the Board as to what the inmate should do to improve chances for parole. Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979).

Finally, we note that there is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. See People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914 (3d Dept. 1992). The Board is presumed to have followed applicable statutory requirements and internal policies when making decisions regarding the suitability of an inmate's possible release to parole supervision. See Garner v. Jones, 529 U.S. 244 (2000). There is no evidence that the Board's decision was predetermined. See Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

Recommendation:

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