May 2022

Administrative Appeal Decision - Perez, Carlos (2022-01-25)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Perez, Carlos **DIN:** 93-B-1561

Facility: Woodbourne CF **AC No.:** 01-060-21 B

Findings: (Page 1 of 7)

Appellant is serving an aggregate sentence of 25 years to life upon his conviction by jury trial to Murder 2nd, Criminal Possession of a Weapon 3rd, Unauthorized Use of a Motor Vehicle 1st, and Unauthorized Use of a Motor Vehicle 2nd. In the instant offense, the Appellant shot the victim in point blank range with a rifle, causing his death. The Appellant then drove the victim's vehicle to another area where the vehicle was burned. The Appellant challenges the December 2020 determination of the Board, denying release and imposing a 15-month hold on the following grounds: (1) the Board failed to review all relevant information; (2) the Board failed to review mitigating factors of youth; (3) the Board departed from the COMPAS instrument without sufficient reasoning in violation of §9 NYCRR 8002.2(a); (4) the Board relied solely on the serious nature of the crime (5) the Appellant has satisfied all of his program requirements; (6) the Board relied on erroneous information; (7) the Board improperly relied on a reversed disciplinary infraction; (8) the Appellant adequately expressed remorse during the interview; (9) the Board was biased against him; (10) the decision was conclusory; and (11) the hold is excessive. These arguments are 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 [incarcerated individual] 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 incarcerated individual, including, but not limited to, the individual'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.

After considering all required factors, 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 which involved shooting the victim at point blank range and stealing his vehicle. See Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012); Matter of Symmonds v. Dennison, 21 A.D.3d 1171, 1172, 801 N.Y.S.2d 90, 90 (3d Dept.), lv. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997); Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 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).

The Appellant argues that the Board failed to review the sentencing minutes, PSI, juvenile criminal history and relapse prevention plan. Inasmuch as Appellant contends the Board failed to consider requisite factors, there is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000).

The record as a whole reflects that the Board did consider the appropriate factors, including appellant's instant offense and appellant's criminal history which includes several juvenile offenses. The Board also considered the appellant's extensive disciplinary record. The Board also had before it and considered the appellant's multiple letters of support, program completion records and letters of reasonable assurance from potential employers; appellant's institutional efforts; and his release plans. The Board also received and considered official letters from the Judge and District Attorney as well as the sentencing minutes from the instant offense.

Contrary to Appellant's claim, Hawkins – which requires consideration of youth and its attendant characteristics in relationship to the commission of the crime at issue for inmates serving a maximum life sentence for crimes committed as juveniles – does not apply whereas here the inmate was an adult (20 y.o.) when he committed the offense. 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); accord Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017). See also Miller v. Alabama, 57 U.S. 460 ,132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010). Furthermore, there is no requirement that the Board consider youth at the time of prior crimes as a mitigating factor and the Board must consider an offender's criminal history, which may include crimes committed as a youth. In the Matter of Brian McCarthy, NY Sup. Ct. Index No.: 3664-18 (2018); See e.g. Matter of Amen v. NYS Div. of Parole, 100 A.D.3d 1230 (2012).

Appellant's additional contention that the Board failed to comply with the 2011 amendments to the Executive Law is likewise without merit. The 2011 amendments 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). This is encompassed in the Board's regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each incarcerated individual 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). Thus, the COMPAS cannot mandate a particular result. 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). That is exactly what occurred here.

The decision is consistent with amended 9 NYCRR § 8002.2(a) as there is no departure to explain. That is, the Board's decision was not impacted by a departure from a scale within the assessment. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. In fact, the Board cited the COMPAS instrument in its denial and reasonably indicated concern about the "highly probable"

score for reentry substance abuse, and "high" scores for prison misconduct. The Board relied on these elevated scores, together with other factors, in denying release.

Additionally, the Board is permitted to conclude that the serious nature of the incarcerated individual'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'd 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).

The Board may consider an incarcerated individual's need to complete rehabilitative programming in denying parole. See Matter of Jones v. N.Y. State Bd. of Parole, 175 A.D.3d 1652, 1652, 108 N.Y.S.3d 505, 506 (3rd Dept. 2019); 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). Here, the Appellant still needed to complete [redacted] at the time of the interview.

The appellant argues that the Board failed to review the sentencing minutes and the PSI. In furtherance of this argument, the appellant suggests that the board erroneously identified the murder victim as appellant's "friend", rather than an acquaintance, and thus held the appellant to a higher standard in determining and evaluating his level of remorse. However, a review of the PSI indicates that the murder victim was the appellant's friend at the time of the offense. This was information provided by the appellant himself. Additionally, the appellant failed to raise this issue during his interview. Therefore, there was no error here.

The Appellant argues that the Board improperly relied [redacted] The Board inquired as to the disciplinary violation during the interview and the Appellant had an opportunity to explain that the violation was overturned on December 7, 2020. See pg 11 of the Interview Transcript. The Board then responded that although they did not have that information in their records, they "don't have to deal with that" and confirmed that the most recent disciplinary ticket in his file was dated April of 2018. Therefore, since the Board in fact did not rely [redacted], this argument fails.

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Notwithstanding the above, Courts have held that even in the event that the Board did erroneously [redacted], when there is a large number of disciplinary violations, the Board's conclusion that the appellant had a "poor record of adjustment while in prison" was acceptable. Matter of Tafari v. Evans, 102 A.D.3d 1053, 1053–54, 958 N.Y.S.2d 802, 803 (3d Dept.) lv. denied, 21 N.Y.3d 852965 N.Y.S.2d 790 (2013).

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)) and there is record support. The interview transcript reflects that the Appellant displayed limited remorse for the life of the victim and continued to focus on consequences he has faced. The Court of Appeals held that the Board rationally denied release to a "model prisoner" based upon the brutality of his crime, his refusal to accept responsibility and lack of insight and remorse. Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000).

The incarcerated individual's denial of responsibility for the crime and discipline "illustrate his continued failure to accept responsibility for his conduct, raising a plausible concern as to whether he has made any progress towards rehabilitation." Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 1215-16, 991 N.Y.S.2d 487, 488 (3d Dept. 2014).

While the Appellant argues that the Board was biased against him, there must be support in the record to prove an alleged bias and proof that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Grune v. Board of Parole,41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007).

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(b), as it was sufficiently detailed to inform the incarcerated individual 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 addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations: the instant offense, appellant's failure to take responsibility for his actions for 28 years; high

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COMPAS scores for prison misconduct and re-entry substance abuse; and need for continued [redacted] programming.

Contrary to Appellant's claim, 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).

The Board's decision to hold an incarcerated individual for 15 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, 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 a hold of 15 months for discretionary release was excessive or improper.

Appellant's assertion that the denial of parole release amounted to an improper resentencing also is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release pursuant to Executive Law § 259-i(2)(c)(A) and after considering the factors set 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. See 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. See Matter of Mullins, 136 A.D.3d 1141, 25 N.Y.S.3d 698. Appellant's maximum sentence is life. 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.

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." Matter of Silmon, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)).

Finally, Counsel's Office acknowledges that the Appellant's brief was perfected on April 26, 2021. Due to an office clerical error, Counsel's Office was delayed in responding in a timely manner.

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Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Perez, Carlos **Facility:** Woodbourne CF

NYSID: [redacted] **Appeal Control No.:** 01-060-21 B

DIN: 93-B-1561

Appearances: Cheryl L. Kates PC
PO Box 734
Fairport, NY 14450

Decision appealed: December 2020 decision, denying discretionary release and imposing a hold of 15 months.

Board Member(s) who participated: Drake, Segarra

Papers considered: Appellant's Brief received April 26, 2021

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 Appellant and the Appellant's Counsel, if any, on 01/25/2022 GG

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)