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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Johnson, Larry

DIN: 01-R-5407

Facility: Wyoming CF

AC No.: 02-011-21 B

Findings: (Page 1 of 5)

Appellant challenges the January 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for two separate crimes. In one, he sold crack/cocaine to an undercover police officer. In the second, he forced his way into a store and displayed a gun, raped the female owner of the store, and stole money. Appellant raises the following issues: 1) the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors. 2) the decision failed to list any facts in support of the statutory standard cited. 3) the interview was done in a hostile and biased manner. 4) the decision lacked details. 5) no aggravating factors exist. 6) the Board released inmate's with far worse records. 7) the decision illegally resentenced him. 8) the decision was predetermined. 9) the Board failed to comply with the 2011 amendments to the Executive Law in that the laws are now rehabilitation and future focused. 10) the 24 month hold is excessive.

Executive Law § 259-i(2)(c)(A) requires the Board to consider factors 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 Schendel v. Stanford, 185 A.D.3d 1365, 1366, 126 N.Y.S.3d 428, 429 (3rd Dept. 2020); Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

The Board may emphasize the nature of the instant offenses. 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).

The fact that the Board afforded greater weight to the incarcerated individual's criminal history, as opposed to other positive factors, does not render the denial of parole for that reason irrational or improper. Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Matter of Lashway v. Evans, 110 A.D.3d 1417, 1418, 974 N.Y.S.2d 164, 165 (3d Dept. 2013); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 550 N.Y.S.2d 204 (3d Dept. 1990).

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The Board may consider an incarcerated individual's failure to comply with DOCCS rules in denying parole. See Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013); 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).

The Board stressing the nature of the underlying offense, troubling criminal history and prison disciplinary record, does not constitute irrationality bordering on impropriety. Perez v Evans, 76 A.D.3d 1130, 907 N.Y.S.2d 701 (3d Dept. 2010); Mentor v New York State Division of Parole, 87 A.D.3d 1245, 930 N.Y.S.2d 302 (3d Dept. 2011) lv.app.den. 18 N.Y.3d 803, 938 N.Y.S.2d 860 (2012); Stanley v New York State Division of Parole, 92 A.D.3d 948, 939 N.Y.S.2d 132 (2d Dept. 2012); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016).

There is no evidence the Board's decision was predetermined based upon the instant offense. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000).

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) (rejecting bias claim); Matter of Grune v. Board of Parole, 41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007).

The Board provided its statutory rationale for denying parole. Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale). That the Board "did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion." 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) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also 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) (upholding decision that denied release as "contrary to the best interest of the community").

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The Board’s decision satisfied the criteria set out in Executive Law § 259-i(2)(a), 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).

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 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).

“There is no entitlement to parole based upon comparison with the particulars of other applicants. Rather, each case is sui generis, and the Board has full authority in each instance to give the various factors a unique weighted value.” Matter of Phillips v. Dennison, 41 A.D.3d 17, 22, 834 N.Y.S.2d 121, 124-25 (1st Dept. 2007).

While the Board does not agree that aggravating factors are always necessary to support reliance on an incarcerated individual’s crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there are multiple aggravating factors present here.

“‘Arbitrary action is without sound basis in reason and is generally taken without regard to the facts’; or, put differently, ‘[r]ationality is what is reviewed under . . . the arbitrary and capricious standard.’” Hamilton v. New York State Division of Parole, 119 A.D.3d 1268, 1270 n.1, 990 N.Y.S.2d 714, 716 (3d Dept. 2014) (quoting Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974)).

The petitioner 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 v. Travis, 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)).

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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.

Appellant's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015).

Contrary to Appellant's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent a rehabilitation/future-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive Law was amended to 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, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). 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. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. 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 instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory 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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The Board's decision to hold an incarcerated individual 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, 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 24 months for discretionary release was excessive or improper.

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Johnson, Larry

Facility: Wyoming CF

NYSID: [REDACTED]

Appeal Control No.: 02-011-21 B

DIN: 01-R-5407

Appearances: Charles Greenberg Esq.
3840 East Robinson Road
#318
Amherst, New York 14228

Decision appealed: January 2021 decision, denying discretionary release and imposing a hold of 24 months.

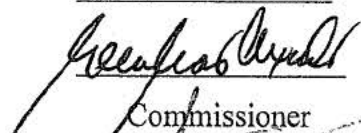
Board Member(s) who participated: Smith, Coppola

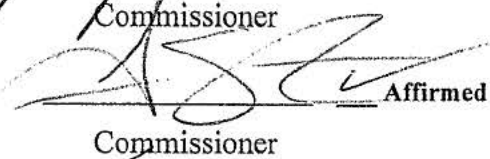
Papers considered: Appellant's Brief received November 12, 2021

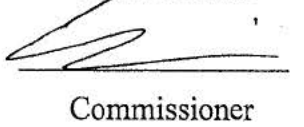
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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:

 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 Appellant and the Appellant's Counsel, if any, on

01/25/2022 66.