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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Leon, Jose

DIN: 04-A-6580

Facility: Adirondack CF

AC No.: 06-006-21 B

Findings: (Page 1 of 4)

Appellant is serving a sentence of 15 years to life upon his conviction by jury verdict to three counts of Sexual Abuse in the 1st Degree. In the instant offense, the appellant attacked a 13-year-old girl he was babysitting, forcibly touched her breasts and buttocks, gyrated his penis against her body and masturbated in front of her. After the assault, he threatened her to not report the incident. Appellant challenges the May 2021 determination of the Board, denying release and imposing a 24-month hold on the following grounds: (1) the Board failed to consider other factors such as the appellant’s institutional accomplishments, programming and lack of disciplinary history; (2) the Board departed from the COMPAS instrument without sufficient reasoning in violation of § 9 NYCRR 8002.2(a); (3) the Board denied release based solely on the seriousness of the offense; and (4) the Board was biased against the appellant. 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,

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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 the sexual abuse of a 13-year-old girl. 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 record as a whole reflects that the Board considered the appropriate factors, including appellant's instant offense and appellant's criminal history. The appellant was sentenced as a mandatory persistent violent felony offender, having previously been convicted of Manslaughter in the 1st Degree and Homicide. He also has a federal felony narcotic conviction. The Board also considered the appellant's two previous failures on community supervision and appellant's disciplinary record. The Board also had before it and considered the appellant's parole packet prepared by the Center for Appellate Litigation which included multiple letters of support, program completion records and letters of reasonable assurance from community agencies; appellant's institutional efforts; and his release plans. The Board also considered an official letter received from the District Attorney as well as the sentencing minutes from the instant offense.

The Board also properly considered the appellant's COMPAS. 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

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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 appellant argues that the Board inappropriately departed from his COMPAS scores and therefore did not comply with the 2017 regulations. However, the Board was clear in their decision that they had considered the COMPAS scores and did not depart from them. The Board did not find a reasonable probability that the Appellant will not live and remain at liberty without violating the law but rather concluded, *despite* low-risk scores, release would be inappropriate under the other two statutory standards. Specifically, the Board stated “[m]ore compelling to this panel than your lower risk scores was your limited insight about the lifelong harm you caused this young girl and any expression of meaningful remorse.” Thus, the Board clearly found that the Appellant’s release “would be compatible (sic) with the welfare of society and furthermore would so deprecate the serious nature of the crime so as to undermine respect for the law.”

A conclusion that an incarcerated individual 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).

The Board permissibly denied parole release as incompatible with the welfare of society based upon the nature of the instant offense and escalation of prior criminal conduct. 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). Even when an incarcerated individual’s institutional record is exemplary, the Board may place particular emphasis on the violent nature or gravity of the crime, so long as the relevant statutory factors are considered. The record establishes the Board acknowledged individual’s institutional accomplishments along with additional statutory factors but placed greater emphasis on the seriousness of his crimes in determining release would be incompatible with the welfare of society and so deprecate the seriousness of the offenses as to undermine respect for the law, as it

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is entitled to do. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1272, 1273-74, 990 N.Y.S.2d 714, 718, 719 (3d Dept. 2014).

Finally, the appellant contends that the Board’s decision is based on personal biases of the Commissioners, however makes no specific citations to the record in furtherance of this claim. The transcript as a whole does not support Appellant’s contention that the parole interview was conducted improperly or that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); see also Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). “Nor is there a basis to find that the Board was predisposed to deny petitioner’s application. Simply because the Board found that the severity of the crime was enough to deny petitioner parole does not mean the Board was biased.” Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 240, 657 N.Y.S.2d 415, 418-19 (1st Dept. 1997).

Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Leon, Jose

Facility: Adirondack CF

NYSID: [REDACTED]

Appeal Control No.: 06-006-21 B

DIN: 04-A-6580

Appearances: Jose Leon (DIN: 04-A-6580)
Adirondack Correctional Facility
PO Box 110
Ray Brook, New York 12977-0110

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

Board Member(s) who participated: Alexander, Davis

Papers considered: Appellant's Letter-brief received October 27, 2021

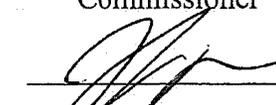
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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

02/02/2022

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