May 2022

Administrative Appeal Decision - Battle, Dayvon (2021-12-23)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Battle, Dayvon **DIN:** 21-R-0006

Facility: Greene CF **AC No.:** 07-003-21 B

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Appellant is serving a sentence of 3 to 6 years upon his conviction by plea to Reckless Endangerment in the First Degree. The instant offense involved the Appellant shooting 14 rounds from a Ruger 9mm handgun in the street and fleeing the scene. In the instant appeal, Appellant challenges the June 2021 determination of the Board, denying release and imposing an 18-month hold on the following grounds: (1) the Board failed to explain the reasoning and rationale for their determination; (2) the Board relied upon erroneous information or otherwise misapprehended the information before it; (3) the COMPAS scores related to risk of felony violence and arrest risk contradict each other; (4) the Board relied on erroneous information within the Pre-Sentence Investigation report; (5) the Board was biased against him; (6) the Board failed to consider other factors such as institutional achievements; (7) the Board drew a negative inference from his lack of participation in programs; (8) the Board improperly resentenced the Appellant; and (9) the 18-month hold was harsh and excessive.

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 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). 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.

Contrary to Appellant's claim, the Board need not explicitly mention each factor considered. Matter of Schendel v. Stanford, 185 A.D.3d 1365, 1366, 126 N.Y.S.3d 428, 429 (3rd Dept. 2020); 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 record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense; the Appellant's criminal history and past supervision violations; his institutional record including clean discipline; programming and release plans. The Board also had before it and considered, among other things, the Pre-Sentence Investigation report, an official statement from the District Attorney's Office, Appellant's case plan, and the COMPAS instrument.

After considering all required factors and principles, the Board acted within its discretion in determining release would not satisfy the applicable standards for release. In reaching its conclusion, the Board permissibly relied on the Appellant's instant offense which appeared to be an escalation of his past criminal behaviors. Additionally, the Board relied on the COMPAS scores, namely the medium risk score for felony violence, which further informed the Board of the reasonable probability that the Appellant would not live and remain at liberty without again violating the law. The Board acted within its discretion in determining these considerations rendered discretionary release inappropriate at this time.

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

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§ 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). The Board is not required to give the COMPAS and case plan greater weight than the other statutory factors. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); accord Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017).

The Appellant argues that the Board misapprehended his low arrest risk COMPAS score when finding that he presented a risk to reoffend. However, the Board considered the entire COMPAS as a whole when making the assessment that he presented a risk for reoffending. The Board specifically cited to the elevated risk of felony violence and history of violence in furtherance of their determination. The Appellant's argument is without merit.

The Appellant's contention that the COMPAS scores related to risk of felony violence and arrest risk contradict each other is without merit. In view of the incarcerated individual's failure to raise purported errors in the COMPAS instrument when given the opportunity to discuss the matter at the interview, and in the absence of any evidence the Board's determination was meaningfully affected by an error of fact, the Board's decision will not be disturbed. Matter of Paniagua v. Stanford, Index # 0913-16, *Decision & Order* dated Oct. 20, 2016 (Sup. Ct. Sullivan Co.)(Schick J.S.C.), aff'd, 153 A.D.3d 1018, 56 N.Y.S.3d 894 (3d Dept. 2017); Matter of Mercer v. New York State Dep't of Corr. & Cmty. Supervision, Index # 5872-13, *Decision/Order/Judgment* dated April 7, 2014 (Sup. Ct. Albany Co.)(Ceresia J.S.C.).

As to the COMPAS procedures, Directive 8500 sets forth the operating procedures for the application of COMPAS Risk and Need Assessment. The Board does not prepare the COMPAS instrument, but merely considers the COMPAS and scores given to each risk or need. Cf Matter of Wall v. Stanford, Index # 2016-00112, *Mem. Decision & Order* dated Oct. 21, 2016 (Sup. Ct. Erie Co.) (Burns J.S.C.) The Board does not determine COMPAS scores and an administrative appeal to the Board is not the proper forum to challenge the COMPAS instrument. See Matter of Staropoli v. Botsford, 183 A.D.3d 1064, 124 N.Y.S.3d 107 (3rd Dept. 2020). The Appellant failed to raise this purported issue during the Board interview and as such, the argument has not been preserved.

To the extent Appellant contends the Board relied on erroneous information in the pre-sentence report, this is not the proper forum to raise the issue. Any challenge to the pre-sentence

report must be made to the original sentencing court. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Matter of Wisniewski v. Michalski., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Matter of Vigliotti v. State, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012). The Board is mandated to consider the report and is entitled to rely on the information contained in the report. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). As appellant failed to raise an objection to the complained of fact at the parole interview, this claim has not been preserved. Matter of Morrison v. Evans, 81 A.D.3d 1073, 916 N.Y.S.2d 655 (3d Dept. 2011); Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000).

The Appellant contends that the Board was biased in their decision-making process. The basis for this contention is that the Commissioner asked him questions regarding his mother's feelings related to his being paroled and compared herself to his mother and her potential feelings.

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). Here, the Commissioner was merely inquiring as to how the Appellant supported himself in the community prior to his arrest and he identified that his mother helped him financially. The conversation then continued about his mother's prior support as well as the Appellant's belief that she would continue to support him if he is paroled. It should be noted that the Appellant did not provide the Board with any letters of support from his mother indicating that he could reside with him and/or that she would support him upon his release. Thus, the Board had no basis to make any determination with regard to the Appellant's mother, other than the information he provided to them. There is no proof in the record to identify any alleged bias on the part of the Board or even that this conversation regarding his mother had any bearing on their ultimate decision to deny parole.

The Appellant argued that the Board drew an unfair negative inference from his lack of participation in programs. Appellant contends that he is waitlisted for several programs due to COVID-19 and insists that this demonstrates his willingness to participate in the programs. This argument is without merit. The Board may consider an incarcerated individual's need to complete rehabilitative programming even where a delay in commencement is through no fault of the individual. See Matter of Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

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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).

The Board's decision to hold an incarcerated individual for 18 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 18 months for discretionary release was excessive or improper.

Recommendation: Affirm.

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Battle, Dayvon **Facility:** Greene CF

NYSID: [redacted] **Appeal Control No.:** 07-003-21 B

DIN: 21-R-0006

Appearances: Dayvon Battle (DIN: 21-R-0006)
Greene Correctional Facility
PO Box 975
Coxsackie, New York 12020

Decision appealed: June 2021 decision, denying discretionary release and imposing a hold of 18 months.

Board Member(s) who participated: Segarra, Samuels

Papers considered: Appellant's Letter-brief received August 25, 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 12/23/2021 GG.

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