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Administrative Appeal Decision - Fernandez, Michael (2022-01-25)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Fernandez, Michael

DIN: 99-A-4016

Facility: Fishkill CF

AC No.: 07-032-21 SC

Findings: (Page 1 of 4)

Appellant challenges the June 2021 determination of the Board, denying release and imposing a 24-month hold. The instant offense involved Appellant and a co-defendant going to the home of the female victim to commit a burglary. While at the residence, Appellant's co-defendant caused the death of the victim – who was in the house with her 17-month-old infant – by stabbing her multiple times and shooting her in the eye. Appellant raises the following issues: 1) the decision was conclusory and lacked detail; 2) the Board failed to comply with the 2011 amendments and completely discounted Appellant's low COMPAS scores; 3) the Board relied almost entirely on the instant offense; 4) the letter from the District Attorney was outdated; 5) the Board displayed bias during the interview and relied on erroneous information; 6) the presentence investigation report and letter from the District Attorney contained unproven accusations; and 7) Appellant's due process rights were violated. 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).

STATE OF NEW YORK – BOARD OF PAROLE

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DIN: 99-A-4016

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AC No.: 07-032-21 SC

Findings: (Page 2 of 4)

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Murder in the second degree; that Appellant was on probation supervision at the time of the instant offense; Appellant's criminal history including a prior conviction for Attempted Criminal Sale of a Controlled Substance in the third degree; Appellant's institutional efforts including completion of all required programs, two college degrees, position as an IPA for ICP, creation of an anti-bullying program, and multiple misbehavior reports but none since 2011; and release plans to live with his wife. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, a letter from the District Attorney, and Appellant's parole packet featuring letters of support and assurance.

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 offense, the fact that the instant offense was committed while on probation supervision for a prior conviction, Appellant's criminal history, and Appellant's continued inconsistent account of the instant offense. See Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1016, 105 N.Y.S.3d 461, 465 (2d Dept. 2019); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Hunter v. New York State Div. of Parole, 21 A.D.3d 1178, 800 N.Y.S.2d 799 (3d Dept. 2005); Matter of Scott v. Russi, 208 A.D.2d 931, 618 N.Y.S.2d 87 (2d. Dept. 1994); Matter of Silmon v. Travis, 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999), aff'd 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

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.

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

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DIN: 99-A-4016

Facility: Fishkill CF

AC No.: 07-032-21 SC

Findings: (Page 3 of 4)

(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 Board committed no error in its consideration of the letter from the District Attorney. Executive Law § 259-i(2)(c)(A)(vii) requires the Board to consider recommendations of the sentencing court, the inmate’s attorney, and the “district attorney.” As such, the Board was obligated to consider the official statement it received from the District Attorney. Appellant’s suggestion that the recommendation is outdated is baseless. As for fresh outreach, a review of the record reveals facility staff sent another letter to the District Attorney requesting an official statement in 2016 and received no response.

Inasmuch as Appellant asserts bias, 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). Here, there is no such proof. There was no impropriety in the Board’s inquiry into Appellant’s inconsistent account of the instant offense. As the challenged questions “were aimed at [Appellant’s] remorse, his acceptance of responsibility and insight into the crimes, they were not improper and did not deprive [Appellant] of a fair interview.” Matter of Payne v. Stanford, 173 A.D.3d 1577, 1578, 104 N.Y.S.3d 383, 385 (3rd Dept. 2019) (citations omitted). A review of the transcript reveals Appellant failed to openly acknowledge during the interview that his co-defendant planned to kill the victim, something he had previously admitted. We also note that the Board’s reference to a second co-defendant being convicted in the instant offense despite not being present that day is factually accurate and does not provide a basis to disturb the decision.

STATE OF NEW YORK – BOARD OF PAROLE

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Findings: (Page 4 of 4)

As for Appellant’s claim that the presentence investigation report and the letter from the District Attorney contain unproven accusations, the Board is required to obtain official reports pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1) and may rely on the information contained therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 706, 708 (2000); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), *lv. denied*, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). 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 noted above, the Board was also obligated to consider the letter from the District Attorney pursuant to Executive Law § 259-i(2)(c)(A)(vii).

Finally, an incarcerated individual has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme “holds out no more than a possibility of parole” and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Fernandez, Michael Facility: Fishkill CF
NYSID: [REDACTED] Appeal Control No.: 07-032-21 SC
DIN: 99-A-4016

Appearances: Eve Rosahn, Esq.
125 Frenchtown Road
Shohola, PA 18458

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

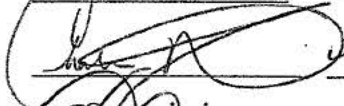
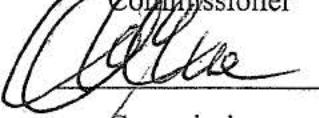
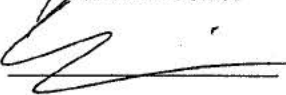
Board Member(s) who participated: Segarra, Mitchell

Papers considered: Appellant’s Brief received November 8, 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.