May 2022

Administrative Appeal Decision - Bugman, Keith G (2022-02-02)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Bugman, Keith **DIN:** 96-B-0889

Facility: Wyoming CF **AC No.:** 08-006-21 B

Findings: (Page 1 of 7)

Appellant challenges the July 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for murdering a woman by cutting her throat with a boot-knife, and then throwing her body into a fire pit while a firing was burning. 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 was due to bias and imposing religious viewpoints in that the Board called appellant the devil. 3) the Board didn't read all pre-sentence memorandum submitted to the court by appellant's criminal defense lawyer. 4) the decision was based upon personal opinion/penal philosophy. 5) the decision lacks details. 6) appellant doesn't need further [redacted] programming or treatment. 7) the Board didn't review all of appellant's parole plan. 8) the decision violated the due process clause of the constitution. 9) the Board punished appellant for taking his case to trial. 10) the decision was predetermined. 11) the decision illegally resentenced him. 12) the decision was based upon community opposition, but none of it was turned over to counsel when it was requested. 13) no aggravating factors exist. 14) the decision is the same as prior decisions. 15) the Board failed to comply with the 2011 amendments to the Executive Law and the 2017 regulations in that the positive COMPAS was ignored, they are evidence and rehabilitation based, there is a presumption of release, and the COMPAS was not properly done.

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 Parole Board's determination denying petitioner parole was rationally based on the seriousness of petitioner's crimes." People ex rel. Watson v. Hollins, 302 A.D.2d 279, 280, 753 N.Y.S.2d 841 (1st Dept. 2003).

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The Board was persuaded by the horrific nature of the crimes. Beodeker v Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Payne v Stanford, 173 A.D.3d 1577, 104 N.Y.S.3d 383 (3d Dept. 2019).

The Board is permitted to consider, and place greater emphasis on, the brutal nature of the offense. Executive Law § 259-i(2)(c)(a); 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 Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), affd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); 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 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).

"[T]here is a strong rehabilitative component in the statute that may be given effect by considering insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

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).

The Board may consider an incarcerated individual's history of drug and/or alcohol abuse. Matter of Espinal v. New York Bd. of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019) (substance abuse history); Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017) (substance abuse history and risk of future drug abuse); Matter of Dean v. New York State Div. of Parole, 21 A.D.3d 1207, 1208, 801 N.Y.S.2d 92, 93 (3d Dept. 2005) (involvement with weapons and drugs), lv. denied, 6 N.Y.3d 705, 812 N.Y.S.2d 34 (2006); Matter of Sanchez v. Dennison, 21 A.D.3d 1249, 801 N.Y.S.2d 423 (3d Dept. 2005) (history of drug abuse); Matter of Llull v. Travis, 287 A.D.2d 845, 846, 731 N.Y.S.2d 405, 406 (3d Dept. 2001) (drug abuse); Matter of Brant v. New York State Bd. of Parole, 236 A.D.2d 760, 761, 654 N.Y.S.2d 207, 208 (3d Dept. 1997) (history of alcohol and drug abuse); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994) (history of alcohol abuse); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1st Dept. 1983) (drug addiction); Matter of Maciag v. Hammock, 88 A.D.2d 1106, 453 N.Y.S.2d 56 (3d Dept. 1982) (problem of alcohol and drug abuse with the concomitant need for programmed counseling).

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.) ("credibility

determinations are generally to be made by the Board"), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008).

The Board is obligated to consider the sentencing minutes where available and any recommendations of the court. Matter of Standley v. New York State Div. of Parole, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006) (de novo granted); cf. Matter of Freeman v. Alexander, 65 A.D.3d 1429, 1430, 885 N.Y.S.2d 379, 380 (3d Dept. 2009) (rejecting challenge because sentencing minutes unavailable).

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). Nor did the Board attempt to impose religious views. The Board was merely using a common metaphor, and in fact on the next page of the transcript explained the limited meaning of what they stated.

The decision does not contain any personal opinion or penal philosophy.

The pre-sentence memorandum submitted to the criminal court were considered by the Board.

The interview revealed appellant is refusing to take needed programming while incarcerated.

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).

The Board did review all materials submitted by the appellant. 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

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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).

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).

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 community opposition, and the Board decision did not state there was any.

Appellant objects to the fact that the Board decision is based on the same reasons given after his last appearance before the Board. However, as the Board is required to consider the same statutory factors each time an incarcerated individual appears, it follows that the Board may deny release on the same grounds as relied upon in previous determinations. Matter of Hakim v. Travis, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3d Dept. 2003); see also Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008) (affirming parole decision, which was worded similarly to two prior denials of parole affirmed by court).

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.

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The record does not support appellant's contention that the Board improperly took into account the inmate's decision to go to trial. Cody v Dennison, 33 A.D.3d 1141, 822 N.Y.S.2d 677 (3d Dept. 2006), lv.den.8 N.Y.3d 802, 830 N.Y.S.2d 698.

"'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)).

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). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017.

The 2011 amendments to the Executive Law, as well as the state regulations governing parole, do not create a legitimate expectancy of release that would give rise to a due process interest in parole. Fuller v Evans, 586 Fed. Appx. 825 (2d Cir. 2014) cert.den. 135 S.Ct. 2807, 192 L.Ed2d 851. The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision. There is no due process clause liberty interest from a State statute that merely establishes procedural requirements. Cofone v Manson, 594 F.2d 934, 938 (2nd Cir. 1979); *Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) ("The State may choose to require procedures . . . but in making that choice the State does not create an independent substantive right.").

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And claims that the Executive Law amendments create objective and evidence based procedures, which creates a liberty interest, are incorrect. Franza v Stanford, 2019 WL 452052 (S.D.N.Y. 2019).

There is no merit to Appellant's claim that a favorable COMPAS instrument gives rise to a presumption of rehabilitation and release. Since 1977, the Board has been required to apply the same three-part substantive standard. Executive Law § 259-i(2)(c)(A). The 2011 amendments require the Board to incorporate risk and needs assessment principles to "assist" in measuring an incarcerated individual's rehabilitation and likelihood of success upon release. Executive Law § 259-c(4). The statute thus does not clearly create a presumption of rehabilitation based on a favorable risk and needs assessment, let alone a presumption of parole release requiring the Board to provide countervailing evidence. Indeed, while the Board might, for example, find an incarcerated individual sufficiently rehabilitated to satisfy the first prong of the standard—that the individual will "live and remain at liberty without violating the law," the Board could also find, in its discretion, as it did here, that the individual's release would be incompatible with the welfare of society or would unduly deprecate the seriousness of a crime. The text of the statute therefore flatly contradicts the incarcerated individual's assertion that even uniformly low COMPAS scores create a presumption of release. See Matter of King v. Stanford, 137 A.D.3d at 1397. The COMPAS is an additional consideration that the Board must weigh along with the statutory factors for purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d at 1108; accord Matter of Dawes v. Annucci, 122 A.D.3d at 1061. This is exactly what occurred here.

Moreover, amended 9 NYCRR § 8002.2(a) also did not create a presumption in favor of release when scores on a periodically-validated risk assessment instrument are low. "The creation of any such presumption is a legislative function and would conflict with the requirements of Executive Law § 259-i." Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. The amended regulations also do not alter how the Board considers the COMPAS instrument. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2 (reaffirming "any [risk and needs] instrument used is not dispositive"). The COMPAS does not (and cannot) supersede the Board's authority to determine, based on members' independent judgment and application of section 259-i(2)(c)(A)'s factors, whether an incarcerated individual should be released. See 2011 N.Y. Laws ch. 62, § 1, part C, § 1, subpart A, § 1; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. The new regulation was intended to increase transparency in the Board's decision making by providing an explanation if a decision denying release was impacted by a departure from any scales within the COMPAS instrument. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2.

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As for COMPAS departure, the Board decision stated the appellant could not remain at liberty without violating the law, and cited the risk of felony violence scale. So the specific scale was identified, and reasons were given for the departure. In so doing, the Board identified the scale from which it was departing and provided an explanation consistent with 9 NYCRR § 8002.2(a).

Recommendation: Affirm.

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Bugman, Keith **Facility:** Wyoming CF

NYSID: [redacted] **Appeal Control No.:** 08-006-21 B

DIN: 96-B-0889

Appearances: Cheryl Kates Esq.
P.O. Box 734
Fairport, New York 14450

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

Board Member(s) who participated: Coppola, Berliner, Drake

Papers considered: Appellant's Letter-brief received November 22, 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 02/02/2022 GG

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