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Administrative Appeal Decision - Smith, Brian D (2021-12-03)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Smith, Brian

DIN: 21-B-0563

Facility: Marcy CF

AC No.: 08-122-21 B

Findings: (Page 1 of 3)

Appellant challenges the July 2021 determination of the Board, denying release and imposing a 12-month hold. Appellant is incarcerated for two separate crimes. In the first, he was in the residence of his estranged girlfriend, in violation of an Order of Protection, and tried to strangle her. In the second, he drove his car in an intoxicated condition which, upon his arrest, he blew a .34% BAC. Appellant raises the following issues: 1) the Board failed to consider and/or properly weigh the required statutory factors. 2) it isn't his fault that he had not yet completed all programming, as many programs have been postponed due to covid. 3) the decision is based upon erroneous information. Specifically, the violation of probation was very late into the term, and it was not for violating an Order of Protection.

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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Findings: (Page 2 of 3)

After considering the relevant factors, the Board was allowed to place greater emphasis on the incarcerated individual's criminal record including prior failures while under community supervision. See, e.g., Matter of Bello v. Bd. of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); 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).

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 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).

Per the Pre-sentence Investigation Report, the appellant violated probation, and was re-sentenced to six months in jail and probation again, during the original probation term-and not near the end of the term. And the Board decision didn't say the violation of probation was for violating an Order of Protection. Pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports 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) (discussing former status report); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.) (presentence investigation report), 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). There is no support in the record that the Board relied upon incorrect or erroneous information. Shark v New York State Division of Parole Chair, 110 A.D.3d 1134, 972 N.Y.S.2d 741 (3d Dept. 2013); Khatib v New York State Board of Parole, 118 A.D.3d

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Findings: (Page 3 of 3)

1207, 988 N.Y.S.2d 286 (3d Dept. 2014); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); Peterson v Stanford, 151 A.D.3d 1960, 59 N.Y.S.3d 219 (4th Dept. 2017).

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.

Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Smith, Brian

Facility: Marcy CF

NYSID: [REDACTED]

Appeal Control No.: 08-122-21 B

DIN: 21-B-0563

Appearances: Brian Smith 21B0563
Marcy Correctional Facility
9000 Old River Road
P.O. Box 5000
Marcy, New York 13403

Decision appealed: July 2021 decision, denying discretionary release and imposing a hold of 12 months.

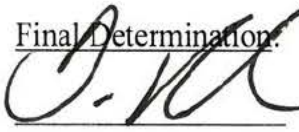
Board Member(s) who participated: Coppola, Davis, Lee


Papers considered: Appellant’s Letter-brief received October 1, 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 _____

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 12/03/2021 66.

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