May 2022

Administrative Appeal Decision - Mills, Richard F (2022-01-25)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Mills, Richard **DIN:** 02-B-0778

Facility: Wyoming CF **AC No.:** 09-008-21 B

Findings: (Page 1 of 5)

Appellant is serving an aggregate sentence of 20 years to life upon his conviction by verdict to Attempted Murder in the First Degree, Attempted Assault in the First Degree, Reckless Endangerment in the First Degree and two counts of Criminal Possession of a Weapon in the Third Degree. The instant offense involved the police officers responding to an incident at the Appellant's residence due to his threats of self-harm. When officers arrived, the Appellant pointed and shot his loaded rifle at the officers. Appellant challenges the August 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 including Appellant's institutional accomplishments and lack of disciplinary history; (2) the Board relied on erroneous information regarding his convictions; (3) the Board reviewed the incorrect sentencing minutes; (4) the Board inappropriately relied on official letters from the sentencing judge; (5) the Appellant was not provided counsel; and (6) the time computation is incorrect. These arguments are without merit.

Notably, the Appellant waived his appearance at the Parole Board interview. An incarcerated individual who refuses to attend a Board interview has failed to preserve any procedural challenges to the manner in which the proceeding was conducted. See Matter of Shaw v. Fischer, 126 A.D.3d 1533, 4 N.Y.S.3d 568 (4th Dept. 2015). Nevertheless, the Appellant's arguments are considered and discussed below.

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

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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, 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 included the attempted murder of a police officer, and attempted assault of another. 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; Appellant's criminal history which incudes multiple misdemeanors for DWI and drug paraphernalia; Appellant's institutional efforts including his disciplinary record, which includes two tier II misbehavior reports, and accomplishments; and his release plans. It was noted by the Board that the Appellant refused programs in [redacted], ART and TSS II and III. The Board also had before it and considered among other things, the Appellant's parole packet and the PSI. The Board also considered the documentation provided by the Appellant which included letters of support and certificates.

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). 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).

There is a presumption of honesty and integrity that attaches to Judges and administrative factfinders. 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 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).

The Appellant argues that the Board relied on incorrect information regarding his convictions. 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); 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 appellant failed to raise an objection to the complained of fact at the parole interview, as he waived his appearance therein, 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 Board erred in reference to Attempted Murder 2nd in the decision transcript, when the appellant was, in fact convicted of Attempted Murder 1st. However, this is a typographical error that does not provide a basis to disturb the Board decision. See People ex rel. Dell v. Walker, 186 A.D.2d 1043, 588 N.Y.S.2d 685, 686 (4th Dept. 1992), lv. denied, 81 N.Y.2d 702, 594 N.Y.S.2d 716 (1992). The misstatement of fact in the Board determination did not rise to a level where it affected

the Board's decision, and as such any alleged error would be deemed harmless such that no new proceeding is required. Matter of Rossney v. New York State Div. of Parole, 267 A.D.2d 648, 649, 699 N.Y.S.2d 319 (3d Dept. 1999), lv. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6 (2000). In addition, inasmuch as the reference favored Appellant, any error was harmless such that no new proceeding is required. See Matter of Rossney v. New York State Div. of Parole, 267 A.D.2d 648, 649, 699 N.Y.S.2d 319 (3d Dept. 1999), lv. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6 (2000).

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); cf. Matter of Freeman v. Alexander, 65 A.D.3d 1429, 1430, 885 N.Y.S.2d 379, 380 (3d Dept. 2009). The Appellant argues that the Board reviewed and relied on the incorrect sentencing minute transcripts in their decision. The sentencing minutes are included in the record and the Board expressly mentioned them in their decision. A review of the documentation before the Board revealed that the Board had three different sentencing minutes available for their review from 2002, 2004 and most recently 2019. These sentencing minutes reflect the changes to the Appellant's status related to his success on appeal. Thus, the Appellant's argument related to the sentencing minutes is without merit.

The Board committed no error in its consideration of official opposition to release. Executive Law § 259-i(2)(c)(A)(vii) requires the Board to consider recommendations of the sentencing court, the incarcerated individual's attorney, and the "district attorney." As such, the Board was obligated to consider the official letter from the original sentencing judge in their deliberations.

The Appellant argues that he was denied his right to an attorney during the Parole Board review. Pursuant to Executive Law §259-i(2)(a), the incarcerated individual had a Parole Board Release Interview, and not a hearing. The interview is not an adversarial proceeding and there is no right to have an attorney present on behalf of the incarcerated individual. Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 76, 427 N.Y.S.2d 982 (1980); Matter of Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 298 N.Y.S.2d 704 (1969); Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970); McCall v. Pataki, 232 F.3d 321, 323 (2d Cir. 2000); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). While courts have recognized there are (rare) special circumstances that may warrant the presence of counsel, there must be a showing that the incarcerated individual [redacted] that he is incapable of speaking on his own behalf. Matter of Stern v. New York State Dept. of Corr. & Cmty. Supervision, Index No. 1933/2016, *Decision & Order* dated Dec. 13, 2017 (Sup. Ct. Dutchess Co.) (Grossman, J.S.C.). This is not the case here.

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Insofar as the incarcerated individual challenges the Department's sentencing time calculation, the matter is beyond the scope of the Board's jurisdiction. 9 NYCRR § 8006.3; id. §§ 8006 *et seq*.

In conclusion, Appellant 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, 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)).

Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Mills, Richard **Facility:** Wyoming CF

NYSID: [redacted] **Appeal Control No.:** 09-008-21 B

DIN: 02-B-0778

Appearances: Richard Mills (DIN: 02-B-0778)
Wyoming Correctional Facility
PO Box 501
Dunbar Road
Attica, New York 14011

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

Board Member(s) who participated: Lee, Coppola

Papers considered: Appellant's Letter-brief received September 17, 2021

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

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, 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 01/25/2022 GG

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