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Administrative Appeal Decision - Richard, John W (2022-02-02)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Richard, John

DIN: 91-A-0169

Facility: Woodbourne CF

AC No.: 10-026-21 B

Findings: (Page 1 of 4)

Appellant is serving an aggregate sentence of 32 years to life upon his conviction of by verdict to Murder 2nd; Criminal Possession of a Weapon 3rd; Criminal Possession Stolen Property 4th; Murder 2nd (2 counts); Grand Larceny- Not Auto 4th; and Attempted Assault 2nd. In the instant offense, the appellant and his co-defendant were attempting to steal a vehicle when they were caught by a security guard. Upon being confronted by the security guard, a physical altercation ensued, and the appellant shot the security guard, causing his death. The appellant challenges the September 2021 determination of the Board, denying release and imposing a 24-month hold on the following grounds: (1) the appellant is innocent of the underlying charges; (2) the Board violated appellant's right to due process; (3) the Board improperly relied on appellant's juvenile criminal history and other arrests that did not result in convictions; and (4) the Board was biased against him. 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 inmate 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 inmate, including, but not limited to, the inmate'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); Matter of McKee v. New York State Bd. Of Parole,

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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.

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses, wherein appellant shot and killed a security officer during a botched car theft; appellant's limited expressions of insight and remorse regarding the instant offense; appellant's institutional adjustment including 47 tier II and 23 tier III misbehavior reports which included multiple incidents involving weapons and violence; and appellant's institutional efforts including his completion of [REDACTED], ART, Phase I and II of Transitional Services and his participation in vocational programs. The Board also had before it and considered, among other things, appellant's "parole portfolio" which included legal documents, written statement, release plan, letters of assurance from the [REDACTED] [REDACTED] the sentencing minutes; PSI; case plan; and the COMPAS instrument.

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 serious nature of Appellant's instant offense which indicated an escalation in violent criminal behavior, together with appellant's lack of insight and minimization of his role in the instant offense. See 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), aff'd 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); Matter of Singh v. Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept. 2014); Matter of Klein v. New York State Div. of Parole, 202 A.D.2d 319, 319-20, 609 N.Y.S.2d 208, 208 (1st Dept. 1994); Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

The appellant claims that he is innocent of the murder charges for which he was convicted. However, a parole interview is not an adversarial proceeding and there are no disputed issues of fact. Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970), cert. den. 400 U.S. 1023, 91 S. Ct. 588 (1971); Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28, 298 N.Y.S.2d 704, 710 (1969). The Board is obligated to rely upon appellant's conviction and assume his guilt in making its determination. Executive Law § 259-i; 9 N.Y.C.R.R. §§ 8001.3 and 8002.1, et seq.; Matter of Silmon v. Travis, 95 N.Y.2d 470, 476-77, 718 N.Y.S.2d 704, 707-708 (2000); Matter of Vigliotti v. State Executive Div. of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012). It is

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not the Board's role to reevaluate a claim of innocence. Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017).

The appellant has argued that the Board of Parole violated his right to due process. However, 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).

At most, incarcerated individuals may have "minimal due process rights" that are limited to not being denied parole for constitutionally arbitrary or impermissible reasons, which requires a showing of egregious official conduct. Graziano v. Pataki, 689 F.3d 110 (2d Cir. 2012); accord Bottom v. Pataki, 610 Fed. Appx. 38 (2d Cir. 2015); Borrell v. Superintendent of Wende Corr. Facility, No. 12-CV-6582 CJS MWP, 2014 WL 297348, at *7 (W.D.N.Y. Jan. 27, 2014), appeal dismissed (Oct. 31, 2014). "[D]enial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute." Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008) (citations omitted). Here, the Board relied on the permissible factors in rendering their decision.

The appellant claims that the Board impermissibly considered and relied on his juvenile criminal history. [REDACTED]

[REDACTED] Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017); Robinson v New York State Board of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018). [REDACTED]

[REDACTED] pro [REDACTED]

[REDACTED] Matter of Pina v. Hammock, 89 A.D.2d 799, 453 N.Y.S.2d 479 (4th Dept. 1982); People v Vite-Acosta, 184 Misc.2d 206, 708 N.Y.S.2d 585 (Sup. Ct. Bronx County 2000); U.S. v Cuello, 357 F.3d. 162 (2d Cir. 2004); Murray v Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Amen v New York State Division of Parole, 100 A.D.3d 1230, 954 N.Y.S.2d 276 (3d Dept. 2012); Martin v New York State Division of Parole, 47 A.D.3d 1152, 851 N.Y.S.2d 664 (3d Dept. 2008).

With regard to the appellant's contention that the Board improperly considered arrests that did not result in convictions, this argument fails. While the Board was vaguely aware of the

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appellant's arrest history, as it was contained in the criminal history report and considered in the COMPAS analysis, the only information contained within those documents was the number of arrests, with no other details. Additionally, the Board gave the appellant an opportunity to discuss a previous arrest for Murder in detail and his subsequent acquittal. There is no proof in the record that the Board relied on the appellant's previous arrest and thus, there is no support for the appellant's contentions. See Matter of Amen v. NY State Div. of Parole, 100 AD3d 1230 (3d Dept 2012); Matter of Gardiner v. New York State Div. of Parole 48 AD3d 871 (3d Dept 2008); Matter of Grune v. Board of Parole, 4 AD3d 1014 (3d Dept 2007).

Finally, the appellant contends that the Commissioners were biased against him, evidenced by their conduct and line of questioning during the interview. 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). During the interview, the appellant claimed that he was not responsible for the death of the security officer, since it was his co-defendant who shot him. Here, the Commissioner was not attempting to manipulate the appellant into admitting to shooting the security officer, as appellant argues. Instead, the Commissioner was merely attempting to gauge the appellant's insight into his actions and how his actions contributed to the death of the security officer, regardless of whether he pulled the trigger or not. There is no proof in the record to identify any alleged bias on the part of the Board.

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Richard, John

Facility: Woodbourne CF

NYSID: [REDACTED]

Appeal
Control No.: 10-026-21 B

DIN: 91-A-0169

Appearances: John Richard (91-A-0169)
Woodbourne Correctional Facility
PO Box 10000
99 Prison Road
Woodbourne, NY 12788

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

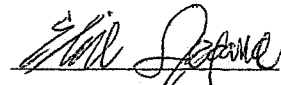
Board Member(s)
who participated: Lee, Demosthenes, Coppola

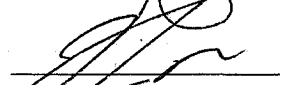
Papers considered: Appellant's Brief received November 5, 2021

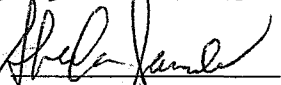
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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

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