May 2022

Administrative Appeal Decision - Smith, Senna (2022-03-02)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Smith, Senna **DIN:** 19-G-0671

Facility: Albion CF **AC No.:** 10-047-21 B

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Appellant challenges the September 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense is for lighting a fire at the house of her estranged boyfriend, while someone was inside it, to try to burn it down. 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 is based upon personal opinion and penal philosophy. 3) the decision lacks detail. 4) the Commissioners were abusive to her. 5) the decision illegally resentenced her. 6) appellant is a victim of domestic violence. 7) the Board ignored her receipt of an EEC. 7) the decision was predetermined. 8) the decision was in violation of a DOCCS Directive. 9) the decision lacks substantial evidence. 10) the decision violated the due process clause of the constitution. 11) the Board failed to comply with the 2011 amendments to the Executive Law, and the 2017 regulations, in that no SASSI was done, the departure didn't mention any scales, and the laws create a presumption of release as they are rehabilitation and evidence based.

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 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 offense and that it was an escalation in illegal behavior. 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).

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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 take note that the crime was premeditated, and carried out with an anger in order to seek revenge. Gaston v Berbary, 16 A.D.3d 1158, 791 N.Y.S.2d 781 (4th Dept. 2005). The Board was free to place emphasis on the inmate's uncontrollable anger during the commission of the crime. Schendel v Stanford, 185 A.D.3d 1365, 126 N.Y.S.3d 428 (3d Dept. 2020).

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 may take into account an incarcerated individual's mental health when denying parole release. See Matter of Dudley v. Travis, 227 A.D.2d 863, 642 N.Y.S.2d 386 (3d Dept.), lv. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379 (1996); Matter of Baker v. Russi, 188 A.D.2d 771, 591 N.Y.S.2d 540 (3d Dept. 1992); see also Pender v. Travis, 243 A.D.2d 889, 662 N.Y.S.2d 642 (3d Dept. 1997), lv. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404 (1998); People ex rel. Brown v. New York State Dept. of Correctional Services, Parole Bd. Div., 67 A.D.2d 1108, 415 N.Y.S.2d 137 (4th Dept. 1979), appeal denied, 47 N.Y.2d 707, 418 N.Y.S.2d 1025 (1979); Rodriguez v. Henderson, 56 A.D.2d 729, 730, 392 N.Y.S.2d 757, 758 (4th Dept.), lv. denied, 42 N.Y.2d 801, 397 N.Y.S.2d 1025 (1977).

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).

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"[T]here is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000). The Board may consider the lack of insight. Crawford v New York State Board of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016). And that her insight was limited. Pulliam v Board of Parole, 197 A.D.3d 1495, 153 N.Y.S.3d 704 (3d Dept. 2021).

The decision was not based upon any personal opinion or penal philosophy.

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 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). Appellant has failed to overcome the presumption that the Board complied with its duty. See Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136 (2d Dept. 1985). 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).

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).

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).

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,

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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).

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).

Receipt of an EEC does not preclude denial of parole. Matter of Milling v. Berbary, 31 A.D.3d 1202, 1203, 819 N.Y.S.2d 373, 374 (4th Dept.), lv. denied, 7 N.Y.3d 808, 809, 822 N.Y.S.2d 481 (2006); Matter of Romer v. Dennison, 24 A.D.3d 866, 867, 804 N.Y.S.2d 872, 873 (3d Dept. 2005); Matter of Barad v. New York State Bd. of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), lv. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001).

There are no substantial evidence issues. Matter of Tatta v. Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept.), lv. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005); cf. Matter of Horace v. Annucci, 133 A.D.3d 1263, 20 N.Y.S.3d 492 (4th Dept. 2015).

As for the DOCCS Directives, since internal guidelines are not promulgated pursuant to an express grant of legislative authority, they have no force of law. People ex rel. MacKelvey v New York State Division of Parole, 138 A.D.2d 549, 526 N.Y.S.2d 135, 136 (2d Dept 1988), appeal denied 72 N.Y.2d 802, 530 N.Y.S.2d 554 (1988); Bratton v New York State Board of Parole, 23 A.D.3d 879, 804 N.Y.S.2d 138 (3d Dept. 2005); Perez v Evans, 76 A.D.3d 1130, 907 N.Y.S.2d 701 (3d Dept. 2010). The internal procedures manual of an executive agency does not create due process rights in the general public. Lynch v U.S. Parole Commission, 768 F.2d 491, 497 (2d Cir. 1985).

"'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.

Appellant argues COMPAS has limitations requiring consideration of special risk assessments when an incarcerated individual presents with a history of substance abuse offenses. However, there is no requirement that the Board consider additional risk assessments beyond the COMPAS instrument. Matter of McCarthy v. New York State Dep't of Corr. & Cmty. Supervision, Index No. 3664/18, *Decision/Order/Judgment* dated Oct. 18, 2018, at 3 (Sup. Ct. Albany Co.) (Ceresia, S.C.J.). The COMPAS instrument simply suggests that in the case of incarcerated individuals with elevated substance abuse scores, an additional assessment such as a Substance Abuse Subtle Screening Inventory ("SASSI") might be useful upon release.

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).

Appellant cites a 1995 court decision for the proposition that the 2011 amendments to the Executive Law create a presumption of release. There is no merit to Appellant's claim that a

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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. 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.

The Board considered Appellant's COMPAS instrument but expressed disagreement with the low scores for risk of felony violence and arrest risk. Matter of Schendel v. Stanford, 185 A.D.3d 1365, 1366, 126 N.Y.S.3d 428, 429 (3rd Dept. 2020). In so doing, the Board identified the scale from which it was departing and provided an explanation consistent with 9 N.Y.C.R.R. § 8002.2(a).

Recommendation: Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Smith, Senna **Facility:** Albion CF

NYSID: [redacted] **Appeal Control No.:** 10-047-21 B

DIN: 19-G-0671

Appearances: Senna Smith 19G0671
Albion Correctional Facility
3595 State School Road
Albion, New York 14411

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

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

Papers considered: Appellant's Brief received December 28, 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 03/02/2022 GG

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