Administrative Appeal Decision - Pulliam, Dwayne (2018-01-25)

Administrative Appeal Decision Notice

Inmate Name: Pulliam, Dwayne **Facility:** Fishkill Correctional Facility

NYSID No.: [redacted] **Appeal Control #:** 08-036-17-B

Dept. DIN#: 99A2489

Appearances:
For the Board, the Appeals Unit
For Appellant: Kathy Manley Esq.
26 Dinmore Road
Selkirk, New York 12158

Board Member(s) who participated in appealed from decision: **Alexander, Thompson, J. Smith**

Decision appealed from: 7/2017-Denial of discretionary release, with imposition of 24 month hold.

Pleadings considered: Brief on behalf of the appellant received on December 13, 2018.
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision (Form 9026), COMPAS, TAP/Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

_____ ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Reversed 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 Inmate and the Inmate's Counsel, if any, on 1/25/18TH.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

Inmate Name: Pulliam, Dwayne **Facility:** Fishkill Correctional Facility

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Findings:

Counsel for the appellant has submitted a brief to serve as the perfected appeal. The brief raises two primary issues.

Appellant's first claim is 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. Appellant contends he has an excellent institutional record and release plan, but all the Board did was to look only at the instant offense/criminal history. Appellant alleges the Board failed to provide detail, violated the pending new regulations, and issued a predetermined decision that is in violation of the due process clause of the constitution.

In response, while not all of the factors to be considered by the Board were actually discussed with the appellant at the interview, it is well settled that the failure to do so does not provide a basis for upsetting the Board's decision. Morel v Travis, 18 A.D.3d 930, 793 N.Y.S.2d 920 (3d Dept. 2005); Matter of Waters v. New York State Division of Parole, 252 A.D.2d 759, 760-61, 676 N.Y.S.2d 279, 280 (3d Dept 1998), lv. denied, 92 N.Y.2d 812, 680 N.Y.S.2d 905 (1998); Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136 (2d Dept. 1985); Matter of Mackall v. New York State Board of Parole, 91 A.D.2d 1023, 458 N.Y.S.2d 251 (2d Dept. 1983) Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). That the Board did not discuss each factor with the inmate at the interview does not constitute convincing evidence that the Board did not consider the factors. In the Matter of Hawkins v. Travis, 259 A.D.2d 813, 686 N.Y.S. 2d 198 (3d Dept. 1999), app. dism. 93 N.Y.2d 1033, 697 N.Y.S.2d 556 (1999); Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); In re Garcia v. New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997); Matter of Mackall v. NYS Board of Parole, 91 A.D.2d 1023, 1024, 458 N.Y.S.2d 251 (2d Dept 1983); Charlemagne v New York State Division of Parole, 281 A.D.2d 669, 722 N.Y.S.2d 74, 75 (3d Dept 2001). Nor is the Board required to expressly discuss or articulate every factor in its determination. Marszalek v Stanford, 152 A.D.3d 773, 59 N.Y.S.3d 432 (2d Dept. 2017);Fraser v Evans, 109 A.D.3d 913, 971 N.Y.S.2d 332 (3d Dept. 2013); Faison v Travis, 260 A.D.2d 866, 688 N.Y.S.2d 782 (3d Dept 1999) lv. dismissed 93 N.Y.2d 1013, 697 N.Y.S.2d 567 (1999); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Esquilin v New York State Board of Parole, 144 A.D.3d 846, 40 N.Y.S.3d 279 (2nd Dept. 2016); Robles v Dennison, 449 F.Appx. 51, 53-54 (2nd Cir. 2011); Lewis v Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017).

STATE OF NEW YORK - BOARD OF PAROLE

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The Board is obligated to consider the inmate's prior criminal record. Matter of Partee v Evans, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014). The Board may put more weight on the inmate's criminal history. Bello v Board of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Hall v New York State Division of Parole, 66 A.D.3d 1322, 886 N.Y.S.2d 835 (3d Dept. 2009); Davis v Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327, 6 N.Y.S.3d 774 (3d Dept. 2015); Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). The fact that the Board afforded greater weight to the inmate's criminal history, and not to an alleged positive institutional adjustment, does not render the denial of parole for that reason irrational or improper. Matter of Ortiz v. Hammock, 96 A.D.2d 735, 465 N.Y.S.2d 341 (4th Dept 1983); Peo. ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944, 479 N.Y.S.2d 760 (3d Dept. 1984) lv. to appeal den. 63 N.Y.2d 608, 483 N.Y.S.2d 1023 (1984); Torres v New York State Division of Parole, 300 A.D.2d 128, 750 N.Y.S.2d 759 (1st Dept 2002); Lashway v Evans, 110 A.D.3d 1420, 973 N.Y.S.2d 496 (3d Dept. 2013).

The denial of parole release based upon nature of conviction and criminal history is appropriate. In the Matter of Hawkins v. Travis, 259 A.D.2d 813, 686 N.Y.S.2d 198 (3d Dept. 1999); Farid v. Russi, 217 A.D.2d 832, 629 N.Y.S.2d 821 (3d Dept. 1995); Charlemagne v New York State Division of Parole, 281 A.D.2d 669, 722 N.Y.S.2d 74, 75 (3d Dept 2001); Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Holmes v Annucci, 151 A.D.3d 1954, 57 N.Y.S.3d 857 (4th Dept. 2017).

Per Executive Law 259-i(2)(c)(A), the Board is obligated to consider the inmate's prior criminal record and the nature of the instant offenses, and the fact that such consideration resulted in a parole denial does not reflect irrationality bordering on impropriety. Singh v Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept. 2014).

The Board may place particular emphasis upon the nature of the offense. Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). The Board in its discretion properly placed greater emphasis on the present offenses, as it is not required to give equal weight to all requisite factors. Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016).

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Findings: (continued from page 2)

The Board may consider the brutality of the offense. Dudley v Travis, 227 A.D.2d 863, 642 N.Y.S.2d 386, 387 (3d Dept 1996), leave to appeal denied 88 N.Y.2d 812, 649 N.Y.S.2d 379; Borcsok v New York State Division of Parole, 34 A.D.3d 961, 823 N.Y.S.2d 310 lv. den. 8 N.Y.3d 803, 830 N.Y.S.2d 699 (3d Dept. 2006); Matter of Partee v Evans, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014); Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017). Per Executive Law 259-i(2)(c)(A), the Board may place greater weight on the violence and level of brutality of the crime, as opposed to an excellent institutional record and achievement. Garofolo v Dennison, 53 A.D.3d 734, 860 N.Y.S.2d 336 (3d Dept. 2008).

The Board may consider the inmates minimizing of their role in the crime. Serrano v New York State Executive Department-Division of Parole, 261 A.D.2d 163, 689 N.Y.S.2d 504, 505 (1st Dept 1999).

The Board is empowered to deny parole where it concludes release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering lack of insight. Silmon v Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704, 708 (2000). Appellant was clearly lacking in this area.

The Board did consider the COMPAS, which was mixed, in that he was a risk on re-entry substance abuse, which is relevant to his risk of re-offense. Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017). The COMPAS can contain negative factors that support the Board's conclusion. Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). The Board may refer to a history of drug abuse by the inmate in its decision. People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1st Dept 1983); Concepcion v New York State Board of Parole, 71 A.D.2d 819, 419 N.Y.S.2d 396 (4th Dept 1979); Nunez v Dennison, 51 A.D.3d 1240, 857 N.Y.S.2d 810 (3d Dept. 2008); Cruz v Alexander, 67 A.D.3d 1240, 890 N.Y.S.2d 656 (3d Dept. 2009); Gonzalvo v Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017).

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Findings: (continued from page 3)

The fact that the appellant committed the instant offense while under probation supervision is also a basis for denying parole release. Geames v Travis, 284 A.D.2d 843, 726 N.Y.S.2d 506, 507 (3d Dept 2001); Herouard v Travis, 250 A.D.2d 911, 673 N.Y.S.2d 229, 230 (3d Dept 1998); De La Cruz v Travis, 10 A.D.3d 789, 781 N.Y.S.2d 798, 800 (3d Dept. 2004); Hunter v New York State Division of Parole, 21 A.D.3d 1178, 800 N.Y.S.2d 799 (3d Dept 2005); Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017); Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017).

There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. People ex.rel. Johnson v New York State Board of Parole, 180 A.D.2d 914, 580 N.Y.S.2d 957, 959 (3d Dept 1992). And, Courts presume the Parole Board follows its statutory commands and internal policies in fulfilling its obligations. Garner v Jones, 529 U.S. 244, 120 S.Ct. 1362, 1371, 146 L.Ed2d 236 (2000). The decision was not predetermined. Dean v New York State Division of Parole, 21 A.D.3d 1207, 801 N.Y.S.2d 92 (3d Dept. 2005) lv. den. 6 N.Y.3d 705 (2006); Hakim-Zaki v New York State Division of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006). There is no merit to the inmate's contention that the parole interview was improperly conducted or that he was denied a fair interview. Black v New York State Board of Parole, 54 A.D.3d 1076, 863 N.Y.S.2d 521 (3d Dept. 2008); Rivers v Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017).

The Board set forth in adequate detail the reasons for its denial of the inmate's request for release. Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013). The written Board decision in this case contains sufficient detail. McLain v New York State Division of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept 1994); Walker v Russi,176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept 1991), appeal dismissed 79 N.Y.2d 897, 581 N.Y.S.2d 660 (1992); Thomas v Superintendent of Arthur Kill Correctional Facility, 124 A.D.2d 848, 508 N.Y.S.2d 564 (2d Dept 1986), appeal dismissed 69 N.Y.2d 611, 517 N.Y.S.2d 1025 (1987); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Betancourt v Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017).

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Findings: (continued from page 4)

As for due process/constitutional liberty interest in a legitimate expectation of early release, at the Federal level, there is no inherent constitutional right to parole. Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 2104, 60 L.Ed2d 668 (1979) or to be released before the expiration of a valid sentence. Swarthout v Cooke,562 U.S. 216, 131 S.Ct. 859, 178 L.Ed2d 732 (2011). Nor, under the New York State Constitution, is there a due process right to parole. Russo v New York State Board of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982, 984 (1980); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979). The New York State parole scheme is not one that creates in any prisoner a legitimate expectancy of release. No entitlement to release is created by the parole provisions. Accordingly, appellant has no liberty interest in parole. Duemmel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010); Davis v Dennison, 219 Fed Appx 68 (2d Cir. 2007), cert. den. 552 U.S. 863, 128 S.Ct. 151, 169 Led2d 103 (2007); Rodriguez v Alexander, 71 A.D.3d 1354, 896 N.Y.S.2d 693 (3d Dept. 2010), lv. den. 15 N.Y.3d 703, 906 N.Y.S.2d 817. Thus, the protections of the due process clause are inapplicable. Barna v Travis, 239 F.3d 169, 171 (2d Cir. 2001); Freeman v New York State Division of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept 2005); Watson v New York State Board of Parole, 78 A.D.3d 1367, 910 N.Y.S.2d 311 (3d Dept. 2010).

Completion of the minimum term of the sentence still does not create any protected liberty interest. Motti v Alexander, 54 A.D.3d 1114, 1115 (3d Dept. 2008).

Nothing in the due process clause requires the Parole Board to specify the particular evidence on which rests the discretionary determination an inmate is not ready for conditional release. Duemmel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010). There is no due process requirement that the Parole Board disclose its release criteria. Haymes v Regan, 525 F.2d 540 (2d Cir. 1975).

The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

The proposed new regulations were not in effect at the time of the interview and as such are irrelevant to this appeal.

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Findings: (continued from page 5)

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013).

Since the Board's decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole, it satisfied the criteria set out in section 259-i of the Executive Law. Siao-Pao v Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (Ct. App. 2008); Matter of Whitehead v. Russi, 201 A.D.2d 825, 607 N.Y.S.2d 751 (3d Dept. 1993); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677, 605 N.Y.S.2d 148 (3d Dept. 1993). Moreover, the reasons stated by the Parole Board members for holding appellant are sufficient grounds to support their decision. People ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ganci v Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2d Dept. 1984); Matter of Vuksanaj v. Hammock, 93 A.D.2d 958, 463 N.Y.S.2d 61 (3d Dept. 1983); Matter of Pina v. Hammock, 89 A.D.2d 799, 453 N.Y.S.2d 479 (4th Dept. 1982). Since the Board's challenged decision was made in accordance with the pertinent statutory requirements, it exercised proper discretion in denying appellant early release on parole. In the Matter of Hawkins v. Travis, 259 A.D.2d 813, 686 N.Y.S.2d 198 (3d Dept. 1999), app. dism. 93 N.Y.2d 1033, 697 N.Y.S.2d 556 (1999); Matter of Barrett v. New York State Division of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

Appellant's second claim is the Board failed to comply with the 2011 amendments to the Executive Law in that the COMPAS is overall positive, but only negative in areas before the instant offense took place, and that the statutes now focus on the future.

In response , 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).

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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 2011 amendments still permit the Board to place greater emphasis on the gravity of the crime. Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016). The Board can still consider the nature of the inmate's crimes, the criminal history, the prison disciplinary record, the program accomplishments and post release plans. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014). The Board is obligated to consider the serious nature of the crime. Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014).

Consistent with 9 N.Y.C.R.R. 8002.3(a)(11) and (12), the Board may take into account the COMPAS and TAP, but is not required to give these considerations any greater weight than other relevant factors. Gonzalvo v Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Lewis v Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017). Notably, the 2011 amendments to the Executive Law did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole, namely (1) whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law"; (2) whether release "is not incompatible with the welfare of society"; and (3) whether release "will not so deprecate the seriousness of his crime as to undermine respect for law." *See* Executive Law § 259-i(2)(c)(A). Even uniformly low COMPAS scores and other evidence of rehabilitation would not resolve the broader questions of society's welfare, public perceptions of the seriousness of a crime, or whether release would undermine respect for the law. Thus the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. *Matter of King v Stanford*, No. 521324, 2016 N.Y. App. Div. LEXIS 1732 (3d Dep't Mar. 10, 2016); Furman v Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016).

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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 1107, 1108 (3d Dep't 2014); *accord Matter of Dawes v. Annucci*, 122 A.D.3d 1059, 1061 (3d Dep't 2014).

Even a positive COMPAS score does not create any guarantee to release, but rather is only one factor considered by the Board in exercising its discretion when making a parole determination. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014); Dawes v Beale, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); Byas v Fischer, 120 A.D.3d 1586, 992 N.Y.S.2d 813 (4th Dept. 2014); Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016).

Recommendation:

Accordingly, it is recommended the decision of the Board be affirmed.