Administrative Appeal Decision - Harmon, William (2021-06-28)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Harmon, William **Facility:** Orleans CF

NYSID: [redacted] **Appeal Control No.:** 10-058-20 B

DIN: 99-A-2734

Appearances: Andrew Haddad, Esq.
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1133 Avenue of the Americas
New York, NY 10036

Decision appealed: September 2020 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Smith, Crangle**

Papers considered: Appellant's Brief received March 31, 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 Inmate and the Inmate's Counsel, if any, on 06/28/2021 kl

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

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APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the September 2020 determination of the Board, denying release and imposing a 24-month hold. The instant offenses involved Appellant firing several shots at the victim with a revolver, striking him in the abdomen and right thigh and causing substantial pain and injury. Appellant raises the following issues: 1) the Board gave impermissible weight to the seriousness of the past offense without citing any aggravating factors; 2) the Board's focus was backwards-looking; 3) the Board failed to consider his age and health issues; 4) the Board improperly considered Appellant's failure to remember that a Commissioner on the panel had previously granted him release in 1997; 5) the decision was conclusory and contained boilerplate language; 6) the denial amounted to an illegal resentencing; 7) the Board failed to request and consider statements from Appellant's defense counsel and the District Attorney; 8) the Board failed to consider the sentencing minutes; and 9) the Board failed to meaningfully consider the required statutory factors including Appellant's reentry plans. 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).

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses of Murder in the second degree, Assault in the first degree, and Criminal Possession of a Weapon in the second degree; that Appellant was on parole at the time of the instant offense; Appellant's health issues including open heart surgery in 2015 and two heart attacks since then; Appellant's criminal history featuring three previous state terms of incarceration including two weapon-related convictions; Appellant's institutional efforts including a poor disciplinary record consisting of multiple Tier II and Tier III infractions, program accomplishments, and work as a teaching assistant; and release plans to seek assistance from a reentry organization. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, and Appellant's parole packet featuring release plans and letters of support and assurance.

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 committed while on parole, Appellant's criminal history featuring prior failures while on parole and a pattern of weapon-related crime, and Appellant's poor disciplinary record. See Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of Kenefick v. Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4th Dept. 2016); Matter of Byas v. Fischer, 120 A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Thurman v. Hodges, 292 A.D.2d 872, 873, 739 N.Y.S.2d 324 (4th Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); Matter of Fuchino, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013). The Board also cited the COMPAS instrument's elevated score for history of violence. See Matter of Espinal v. N.Y. State Bd. Of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017).

While the Board does not agree that aggravating factors are always required to support emphasis on an inmate's offense, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, the Board's decision here was based on the additional considerations outlined above. The Board must conduct a case-by-case review of each inmate by considering the statutory factors, including the instant offense. Executive Law § 259-i(2)(c)(A); Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014). Thus, even where the First Department has "take[n] the unusual step of affirming the annulment of a decision of [the Board]", it has nonetheless reiterated that "[t]he Board is not obligated to refer to each factor, or to give every factor equal weight" and rejected any requirement that the Board prioritize "factors which emphasize forward thinking and planning over the other statutory factors." Matter of Rossakis v. New York State Bd. of Parole, 146 A.D.3d 22, 29 (1st Dept. 2016).

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Contrary to Appellant's assertion, the Board was clearly aware of and considered his advanced age and health issues. At the end of the interview, Appellant stated that he is "too old now [and has] a bad heart" before explaining to the Board that he had open heart surgery in 2015, two heart attacks since then, and has had stints put into his veins. (Tr. at 18.) Appellant is perfectly free to apply for special medical parole release. Executive Law §§ 259-r, 259-s.

There is no merit to Appellant's claim that the Board improperly considered his failure to remember that a Commissioner on the panel had previously granted him release in 1997. A review of the interview transcript and the Board's written decision demonstrates that this played no role in the Board's determination. Matter of Tatta v. State, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163, 164 (3d Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Amen v. New York State Div. of Parole, 100 A.D.3d 1230, 1230, 954 N.Y.S.2d 276, 277 (3d Dept. 2012).

The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b), as it was sufficiently detailed to inform the inmate 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). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

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, 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).

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Appellant's contention that the Board failed to request and consider statements from his defense counsel and the District Attorney is likewise without merit. A review of the record reveals recommendations from defense counsel and the District Attorney were properly solicited via request letters from the facility. That Appellant's defense counsel "does not recall" being contacted, and the fact that the District Attorney did not respond to those requests, do not provide a basis to disturb the decision. The Board also referenced the sentencing minutes during the interview. (Tr. at 15.) That the sentencing court did not impose the maximum sentence is not an indication that the sentencing court made a favorable parole recommendation. Matter of Duffy v. New York State Div. of Parole, 74 A.D.3d 965, 903 N.Y.S.2d 479 (2d Dept. 2010).

Finally, inasmuch as Appellant contends the Board failed to consider requisite factors, 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). The Board explicitly discussed Appellant's reentry plans during the interview. (Tr. at 10-11.)

Recommendation: Affirm.